Petition

Office - Supreme Court, U.S.
FILED
DEC 24 1981
ALEXANDER L. STEVAS,
CLERK

81-1197

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 24, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Did the court below erroneously disregard the holdings of the two other circuit courts of appeal which had construed in identical fashion the same insurance policy language under the same general principles of state law applicable in this case, thereby creating enormous practical problems in tens of thousands of asbestos-related cases now pending in the federal and state courts.

2. Did the court below violate accepted limits on appellate review and deny due process of law by reversing the decision of the district court based on independent factual findings by the court of appeals concerning issues which were not before the district court and as to which the district court had denied Respondent's motion to amend its complaint.

3. Did the decision of the court below reversing the well-established rule concerning the insured's burden of proof under state decisional law violate the constitutional requirement that state law must be followed in diversity cases, as established by *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 446 (1959) and *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938) as applied to the District of Columbia.

LIST OF PARTIES

Petitioner Hartford Accident & Indemnity Company ("Hartford") was a defendant in the district court and an appellee in the District of Columbia Circuit. Respondent Keene Corporation ("Keene") was the sole plaintiff in the district court and an appellant and cross-appellee in the District of Columbia Circuit. There were four additional defendants in the district court: Aetna Casualty & Surety Company ("Aetna"), Insurance Company of North America ("INA"), Liberty Mutual Insurance Company ("Liberty"), and Pennsylvania Manufacturers Association Insurance Company ("PMA"). Aetna, INA, and Liberty were appellants and cross-appellees in the District of Columbia Circuit. PMA was dismissed from the case by the district court and that dismissal was the subject of a separate appeal to the District of Columbia Circuit. The Rule 28.1 list of corporations affiliated with Petitioner Hartford appears in Appendix H to this Petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION OF THIS COURT	2
CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
A. The Court Below Created An Irreconcilable Conflict With The Identical Holdings Of The Two Other Circuit Courts Of Appeals Which Have Construed The Same Policy Language In Accordance With The Same Principles Of State Law, Thereby Creating Enormous Practical Problems In The Defense And Potential Settlement Of Tens Of Thousands Of Asbestos-Related Cases	6
B. The Court Below Violated Accepted Limits On Appellate Review And Denied Petitioner Due Process Of Law By Reversing The Decision Of The District Court Based On An Independent Factual Finding Which Was Not Even Before The District Court, Which Had Denied Respondent's Motion To Amend Its Complaint To Add This Factual Allegation	10
C. The Court Below Erroneously Reversed The Well Established State Law Rule Concerning The Insured's Burden Of Proof, In Violation Of The *Erie* Doctrine As Applied To The District Of Columbia	13
CONCLUSION	14

TABLE OF AUTHORITIES

CASES	Page
Carr v. District of Columbia, 177 U.S. App. D.C. 432, 543 F.2d 917 (1976)	10
Crocket v. Lee, 20 U.S. (7 Wheat.) 522 (1822)	12
Dick v. New York Life Insurance Co., 359 U.S. 437 (1959)	13
Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co., 523 F. Supp. 110 (D. Mass. 1981), *appeals docketed*, Nos. 81-1761-1763 (1st Cir. Sept. 25, 1981)	6
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)	13
Free v. Bland, 369 U.S. 663 (1962)	12
Fuentes v. Shevin, 407 U.S. 67 (1972)	10
Huddleston v. Dwyer, 322 U.S. 232 (1944)	7
Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (1981), *cert. denied*, 50 U.S.L.W. 3466 (U.S. December 7, 1981) (Nos. 81-198 and 81-199)	*passim*
Insurance Concepts, Inc. v. Western Life Ins. Co., 639 F.2d 1108 (5th Cir. 1981)	9
Kanelos v. Kettler, 132 U.S. App. D.C. 133, 406 F.2d 951 (1968)	12
Lee v. Flintkote Co., 193 U.S. App. D.C. 121, 593 F.2d 1275 (1979)	13
Miller v. Avirom, 127 U.S. App. D.C. 367, 384 F.2d 319 (1967)	10
Moses-Ecco Co. v. Roscoe-Ajax Corp., 115 U.S. App. D.C. 366, 320 F.2d 685 (1963)	9
Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (U.S. December 7, 1981) (No. 81-200)	*passim*
Ruhlin v. New York Life Insurance Co., 304 U.S. 202 (1938)	7
United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971)	12
Warner v. Godfrey, 186 U.S. 365 (1902)	12
West v. American Telephone & Telegraph Co., 311 U.S. 223 (1940)	14

TABLE OF AUTHORITIES—Continued

CONSTITUTION AND STATUTES	Page
United States Constitution, Article III, Section 2, Clause 1	2
United States Constitution, Fifth Amendment	2
28 U.S.C. Section 1254(1) (1976)	2
28 U.S.C. Section 1652 (1976)	3
OTHER AUTHORITIES	
Business Insurance, October 28, 1981 at 1	3
Business Week, November 9, 1981 at 39-40	3
New York Times, July 3, 1981, Section 1, at 1, col. 1	3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Hartford Accident & Indemnity Company ("Hartford") respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia entered on October 1, 1981.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit, which appears in Appendix A, was rendered by Judge Bazelon and is not yet reported. The Opinion and Judgment of the United States District Court for the District of Columbia appears in Appendix B and is reported at 513 F. Supp. 47.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the District of Columbia Circuit was entered on October 1, 1981. Appendix A, at 2a. On November 19, 1981, petitions for rehearing and suggestions for rehearing *en banc* were denied. Appendix A, at 48a-51a. Jurisdiction to review the judgment is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section II, Clause 1 of the Constitution of the United States provides:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other Public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Fifth Amendment of the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, lib-

> erty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Rules of Decision Act, 28 U.S.C. § 1652 (1976), provides:

> The laws of the several states, except where the Constitution of treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

The issues addressed in the decision of the court below are perhaps the most important insurance law issues ever to be litigated in our judicial system. These issues concern the responsibility of asbestos manufacturers and their insurers for what has been described as the largest, and potentially most costly, group of products liability claims ever to confront American industry.[1] The potential liability is estimated to "add up to billions of dollars".[2] Moreover, the insurance issues presented by the asbestos cases may dictate how insurance liability is apportioned in thousands of other cases for damages due to bodily injury linked to continued exposure to other chemical compounds, such as diethylstilbestol ("DES"), Agent Orange, and even other materials that might not now be suspected to cause such injury.[3]

Prior to the decision by the court below, the virtually identical policy terms here at issue had been construed

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[1] There were some 12,000 product liability lawsuits against asbestos manufacturers as of July 1981 and the number of such cases is increasing at the rate of 400 new cases a month. N.Y. Times, July 3, 1981, § 1, at 1, col. 1.

[2] Business Week, November 9, 1981 at 39-40. Even Respondent Keene recognizes the windfall which it received from the decision of the appellate court below—which Keene characterizes as "one small step for justice and one large step for Keenekind." Business Insurance, October 28, 1981 at 1.

[3] *Id.*

in identical fashion with reference to the same general state law principles by the only two circuit courts of appeals to have faced the issue. Both the Courts of Appeals for the Fifth and Sixth Circuits held that insurance coverage for asbestos-related injury is triggered by injurious exposure to asbestos, and that each insurer is responsible for the costs of indemnification and defense on a *pro rata* basis to the extent that injurious exposure occurred during its policy period.[4] The Court of Appeals for the Sixth Circuit further held that an asbestos manufacturer which chose not to purchase insurance was responsible for a *pro rata* share of indemnity and defense costs attributable to such uninsured periods.[5] Petitioner Hartford was an *amicus curiae* in *Forty-Eight* and a respondent in *Porter*. In both cases, Petitioner Hartford advocated the "injurious exposure" theory which was adopted in both circuits.

The district court decision in this case, which was subsequently reversed by the Court of Appeals for the District of Columbia Circuit, adopted the holdings of *Forty-Eight* and *Porter*, and accordingly entered summary judgment in favor of Petitioner Hartford. This now-vacated holding of the district court, which followed

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[4] Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), aff'd on rehearing, 657 F.2d 814 (1981), cert. denied, 50 U.S.L.W. 3466 (U.S. December 7, 1981) (Nos. 81-198 and 81-199) (hereinafter "Forty-Eight") and Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), cert. denied, 50 U.S.L.W. 3466 (U.S. December 7, 1981) (No. 81-200) (hereinafter "Porter"). Petitioner Hartford generally supported the decisions in *Forty-Eight* and *Porter*, and filed a brief in opposition to the petition for certiorari in the *Porter* case and an *amicus curiae* brief in partial opposition to the petition for certiorari in the *Forty-Eight* case.

[5] The court of appeals for the Fifth Circuit in *Porter* adopted the opinion of the Sixth Circuit in *Forty-Eight* without having to mention explicitly the issue of self-insurance for uninsured periods, because in *Porter* the insured had purchased insurance for the entire period of claimant's exposure.

the rule in the Fifth and Sixth Circuits, was based on the express terms of the insurance policies and on the medical evidence concerning the pathogenesis of asbestos-related disease. The policy terms provide coverage for liability due to "bodily injury" which is "caused by an occurrence"—that is, by an accident or event "including injurious exposure to conditions," which "results, during the policy period, in bodily injury" App. A., at 39 a.[6] The medical evidence established that "bodily injury," which includes injury to tissue and not just diagnosable disease, took place at or shortly after the initial inhalation of asbestos fibers. App. B., at 54a. The district court further held, in accordance with the Fifth and Sixth Circuits, that because the policy terms expressly limit coverage so that it applies only to "bodily injury" which occurs "during the policy period," App. A., at 39a, each insurer is responsible for a *pro rata* share of indemnification and defense to the extent of injurious exposure due to inhalation during its policy period. App. B., at 58a.

The majority opinion of Judge Bazelon for the District of Columbia Circuit repudiated both the holding and rationale of the Fifth and Sixth Circuits which had been followed by the district court.[7] While the district court had made the factual finding—as did the courts in *Forty-Eight* and *Porter*—that asbestos-related diseases consist of discrete injury to the lung tissue upon injurious exposure,[8] Judge Bazelon's opinion simply "declined to rely on that factual characterization."[9] Instead, Judge Bazelon found that insurance coverage is

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[6] Minor variations in policy language as detailed in App. A, at 37a-41a are immaterial to resolution of the issues in this lawsuit. Such minor variations have been found immaterial by every court to decide the issue. *See, e.g.*, App. A. at 7a.

[7] App. A, at 14a n. 16.

[8] App. B, at 56a.

[9] App. A, at 25a.

triggered not only by injurious exposure—as found by the district court, *Forty-Eight* and *Porter*—but also by manifestation,[10] and further by what the court called "exposure in residence."[11] Based on the appellate court's own view of the "reasonable expectations" of Keene, an issue as to which there had been no findings by the district court, the court held that Keene's insurers must pay for all asbestos related liability, even where injury took place during periods when an insurer's policy was not in effect or during periods where Keene had chosen to self-insure. Thus, under Judge Bazelon's ruling, an insurance company which had issued a standard comprehensive liability policy for a period of one year—or even one month—is potentially liable for forty years of losses. Judge Wald, in her concurring opinion, noted that a manufacturer could have no "reasonable expectation" of insurance coverage during self-insured periods.

REASONS FOR GRANTING THE WRIT

A. The Court Below Created An Irreconcilable Conflict With The Identical Holdings Of The Two Other Circuit Courts Of Appeals Which Have Construed The Same Policy Language In Accordance With The Same Principles Of State Law, Thereby Creating Enormous Practical Problems In The Defense And Potential Settlement Of Tens Of Thousands of Asbestos-Related Cases

This is an exceptional diversity case. The court below construed the *same* policy language in light of the *same*

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[10] One district court has adopted a manifestation approach in a decision which is now on appeal. Eagle-Picher Industries, Inc. v. Liberty Mutual Ins. Co., 523 F. Supp. 110 (D. Mass. 1981), *appeals docketed*, Nos. 81-1761-1763 (1st Cir. Sept. 25, 1981).

[11] As explained more fully in Section B below, there was no conceivable support of a finding by the Court of Appeals concerning "exposure in residence" because the district court had denied respondent Keene leave to amend its complaint to assert coverage on the basis of "exposure in residence". See Order dated April 30, 1980 (App. 6, at 118a, ¶ 3). Thus, "exposure in residence" was not at issue in the case. Adoption of "exposure in residence" by the Court of Appeals was plain error.

general principles of state insurance law as did the Courts of Appeals for the Fifth and Sixth Circuits and yet refused to follow the reasoning or reach the same results as the two circuit courts which had previously decided the *same* issue. Indeed the court below simply disregarded these prior decisions with a mere statement that it "decline[d] to adopt" their conclusion. App. A, at 14a n.16.

This conduct not only violated sound principles of judicial administration, but has also created legal uncertainty and enormous practical problems for both insurance companies and asbestos manufacturers in tens of thousands of cases involving billions of dollars in potential liability. For these reasons, this is the rare "exceptional case" in which this Court should review a determination of state law by a circuit court. *See Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

Petitioner Hartford is mindful that "as to questions controlled by state law," conflicts among the circuits "is not *of itself* a reason for granting a writ of certiorari." *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) (emphasis supplied). However, unlike *Ruhlin*, this is *not* a case where "[t]he conflict may be merely corollary to a permissible difference of opinion in the state courts." *Id.* In the instant case, the principles of state law are identical.[12] Moreover, the court below did not even decide which state's law was being applied, but stated that its conclusions would be the same regardless of what state law was applied. App. A., at 10a-11a n. 10. Thus, the conflict among the circuits created by this decision is not corollary to any difference in state law itself. Instead, it reflects a conflict created by the federal courts, no matter which state law is applicable, that only this Court can resolve. *Id.*

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[12] No state court has construed the pertinent policy language "bodily injury" in the context of asbestos-related diseases, where the period of exposure often begins thirty years or more before "disease" is manifested.

The practical consequences of this conflict among the federal courts are immediate and substantial. It is impossible to overstate the utter chaos which the lower court's decision has caused the asbestos manufacturers and their insurers in the handling and potential settlement of cases. As a result of Judge Bazelon's decision, insurers must handle indemnification and defense obligations arising out of identical policy language in fundamentally different—and irreconcilable—ways.

For example, both Keene and Forty-Eight Insulations are co-defendants in numerous cases along with other asbestos manufacturers, often in jurisdictions where the courts have not addressed the coverage question at issue here.[13] In such a case, Forty-Eight's insurers would simply follow the decision in Forty-Eight in allocating defense and indemnity costs. Keene's insurers would attempt to follow Judge Bazelon's opinion.[14] With no consistent resolution by the courts, however, there would be no way to determine whether other manufacturers would pay their own defense and indemnity costs for self-insured periods, as in *Forty-Eight*, or whether insurers would be required to pay all such costs even during periods of self-insurance, as in *Keene*. Even where the relevant policy language is identical, each manufacturer and each carrier would be required to seek its individual determination of how such costs should be apportioned, thereby multiplying litigation, escalating costs, and delay-

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[13] Respondent Keene is a co-defendant in well over 6,000 cases and the number is rising. App. A, at 4a. Most such complaints named all asbestos manufacturers as defendants.

[14] The opinion in *Keene* itself may be difficult to implement, both because the court never clearly delineated the precise method of apportioning costs among insurers and because Keene's excess insurers were not parties to this litigation and are therefore free to litigate the coverage issue elsewhere. Moreover, INA and Liberty Mutual are insurers of both Keene and Forty-Eight Insulations and thus are already subject to conflicting instructions from the Courts of Appeals.

ing or frustrating altogether the resolution of underlying asbestos claims.[15]

Differing legal constructions of the same policy language for codefendants in the same case is not only administrative unworkable and patently unfair to similarly situated insureds, but is also a substantial barrier to settlement of the tens of thousands of asbestos-related cases pending in federal and state courts. No insured can confidently settle any case until it knows how its insurance coverage, if any, will be apportioned. With the current division in the circuit courts of appeals caused by Judge Bazelon's decision, all the insureds and the insurance companies are forced, in effect, to litigate the insurance coverage question prior to settlement, especially since excess insurers may subsequently refuse to contribute upon the exhaustion of the primary policy limits on the asserted grounds that the initial liability was misapportioned by application of the wrong legal standard. Thus, the practical effect of Judge Bazelon's decision is to interfere directly and substantially with the strong public interest encouraging private settlement of these tens of thousands of legal disputes.[16] Without uniform guidelines on which settlement can be predicated, these cases will unnecessarily clog the courts for years.

In sumary, the insurance companies and the asbestos industry face an impossible situation as a result of Judge Bazelon's decision. Subject to conflicting decrees from

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[15] The proliferation of multiple decisions concerning the identical policy language will also create problems of unfairness to insureds. For example, Keene may receive indemnification from insurers for a claimant's injuries due to injurious exposure even during periods when it purchased no insurance, while other similarly situated insureds in the same case would be indemnified only for injurious exposure during periods when they purchased insurance, as in *Forty-Eight.*

[16] See Insurance Concepts, Inc. v. Western Life Ins. Co., 639 F.2d 1108, 1111 (5th Cir. 1981); Moses-Ecco Co. v. Roscoe-Ajax Corp., 115 U.S. App. D.C. 366, 371, 320 F.2d 685, 690 (1963).

circuit courts of appeals construing the same policies pursuant to the same general principle of state law, the parties simply cannot cope effectively with the avalanche of tens of thousands of asbestos-related cases. Such a situation protects neither the insured nor its insurer because it deprives both of the economic certainty which was the very rationale for entering into the insurance contacts. Only this Court can restore certainty to these contracts by granting certiorari and remanding the case to the court below to reconsider its opinion in view of the urgent need for conformity with *Forty-Eight* and *Porter*.

B. The Court Below Violated Accepted Limits On Appellate Review And Denied Petitioner Due Process Of Law By Reversing The Decision Of The District Court Based On An Independent Factual Finding Which Was Not Even Before The District Court, Which Had Denied Respondent's Motion To Amend Its Complaint To Add This Factual Allegation

It is a fundamental principle of appellate view that an appellate court must confine its review to the record in the court below and that a district court decision may not be reversed based on arguments which were not properly before the court and which the parties had no opportunity to consider. *See Carr* v. *District of Columbia*, 177 U.S. App. D.C. 432, 436-37, 543 F.2d 917, 921-22 (1976); *Miller* v. *Avirom*, 127 U.S. App. D.C. 367, 369-70, 384 F.2d 319, 321-22 (1967). Indeed, to do otherwise would be to deny litigants the opportunity to be heard "at a meaningful time and in a meaningful manner" which the due process clause requires. *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972). The appellate court decision in this case, however, violates these fundamental principles and should be reversed.

The appellate court expressly held that "inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies." App. A., at 23a.

The appellate finding that "exposure in residence" causes "bodily injury" so as to trigger policy coverage not only ignored the contrary medical findings of the trial court, but ignored the critical point that there were no allegations whatsoever concerning "exposure in residence" in this case. Indeed, the trial court expressly denied Respondent Keene's last-minute motion to interject an "exposure in residence" allegation into its complaint.[17]

Respondent Keene's original and first amended complaint alleged that bodily injury occurs when asbestos fibers are inhaled or ingested (*i.e.*, "inhalation on exposure"). App. C, at 67a, ¶ 25. App. D, at 78a, ¶ 28. Following completion of almost all discovery and shortly before the filing of its motion for summary judgment, Keene sought leave to file a second amended complaint to allege for the first time, *inter alia*, that bodily injury occurs *both* when asbestos fibers are inhaled or invested" and "subsequent to such inhalation or ingestion." App. E, at 101a, ¶ 40. Petitioner Hartford opposed that amendment on the grounds that discovery had been completed based on Keene's original contention that injury occurred solely at exposure and that extensive new discovery would be required if Keene were permitted to amend its complaint to assert a new theory as to when asbestos-related injury occurs. App. F, at 111a-113a. The trial court accordingly denied Keene's motion to amend its complaint in these respects. App. G, at 116a, ¶ 3. Thus, no allegation of "exposure in residence" was contained in the pleadings before the trial court in the case and the parties were

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[17] The Court of Appeals defined "exposure in residence" as "the subsequent development of disease" following exposure. App. A, at 14a. "Exposure in residence" is the critical factual issue on which the entire legal analysis of the court below is premised. Without a factual finding that "exposure in residence" causes bodily injury, the court below had no factual basis to conclude that an insurer was liable for all periods from initial exposure to ultimate manifestation, especially in the common situation where exposure ceases prior to manifestation.

accordingly precluded by the trial court from discovery on this non-issue.[18]

It was an egregious departure from the accepted and usual course of judicial proceedings for the court below to "raise for the first time and simultaneously rule on a new point [*i.e.*, exposure in residence] which the losing party had no occasion to address with evidence." [19] The court's actions violated the long standing admonition of Chief Justice Marshall that "no rule is better settled than that the decree must conform to the *allegations*, as well as to the proof in the case".[20] The action by the court below violated the paramount considerations of fairness to litigants and effective judicial administration which are enbodied in the due process clause of the Fifth Amendment. It greatly prejudiced Hartford which had no reason or occasion to develop evidence in the record concerning the non-issue of "exposure in resi-

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[18] Similarly, the Court of Appeals erred in making its factual finding that Keene had "reasonable expectations" of insurance coverage from exposure through manifestation. The district court made no such finding. Furthermore, there was no factual basis in the record from which to presume such a "reasonable expectation." Indeed, this was not Keene's "reasonable expectation," since Keene's first amended complaint itself was based solely on the theory that exposure triggers coverage. App. D, at 78a, ¶ 28.

[19] Kanelos v. Kettler, 132 U.S. App. D.C. 133, 136 n. 15, 406 F.2d 951, 954 n. 15 (1968). See also Warner v. Godfrey, 186 U.S. 365, 377 (1902) (it is error for the Court of Appeals to reopen a case in order to allow an amendment asserting a new and distinct ground of relief, and at the same time to treat the case as not reopened and the record as closed, the result being to deprive the defendants of all opportunity of a hearing on the new ground of relief permitted to be asserted against them.)

[20] Crocket v. Lee, 20 U.S. (7 Wheat.) 522, 525 (1822) (emphasis supplied). *Accord*, United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 581 (1976) ("[a] decree must relate specifically and exclusively to the pleadings and proof"). *Cf.* Free v. Bland, 369 U.S. 663, 671 (1962) (where fraud had not been alleged in a pleading, no issue of fraud could be decided on a motion for summary judgment).

dence." This precipitous and unprecedented departure from the "accepted and usual course" of appellate proceedings merits review and summary remand. See Rule 17.1(a), Sup. Ct. Rules.

C. The Court Below Erroneously Reversed The Well Established State Law Rule Concerning The Insured's Burden Of Proof, In Violation Of The *Erie* Doctrine As Applied To The District Of Columbia

As the appellate court itself recognized, state law in all the relevant jurisdictions uniformly requires that an insured must bear the initial burden to prove insurance coverage.[21] The court below also acknowledged that, in a diversity case such as this litigation, state law controls.[22] Nevertheless, the court below simply chose to ignore this well-established rule of state law in its decision, explaining only that "reversal of the ordinary burden of proof will be more equitable for all parties and will prevent unnecessary litigation." [23]

This conduct by the court below violated its duty to apply state law on the substantive issue of burden of proof. *See Dick* v. *New York Life Insurance Co.*, 359 U.S. 437, 446 (1959) ("under the *Erie* rule, presumptions (and their effects) and burden of proof are substantive . . ."). [24] The panel opinion expressly recognized "that the insured generally bears the burden of proving coverage." [25] However, in reversing the burden of proof, the court below did not even purport to apply state law

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[21] App. A, at 34a n. 42.

[22] App. A, at 10 n. 10.

[23] App. A, at 34 n. 42.

[24] While the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938) does not expressly extend to diversity actions filed in the District of Columbia, nevertheless the substantive law of the District of Columbia, including its choice-of-law rules, is to be followed based on the same principles. *E.g.*, Lee v. Flintkote Co., 193 U.S. App. D.C. 121, 124 & n. 14, 593 F.2d 1275, 1278 & n. 14 (1979).

[25] App. A, at 34a n. 42.

of burden of proof or even attempt to analyze how a state court would apply the burden of proof in the context of asbestos-related claims. The court below thus violated the constitutional command of the Court that

> state law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law'.

West v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940). Such a blatant violation of *Erie* warrants review by this Court.

CONCLUSION

For the foregoing reasons, Petitioner Hartford prays that a Writ of Certiorari issue to Review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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December 24, 1981

Supplemental Brief

Office - Supreme Court, U.S.
FILED
JAN 12 1982
ALEXANDER L. STEVAS,
CLERK

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CASES

	Page
Fuentes v. Shevin, 407 U.S. 67, 80 (1972)	6
Insurance Co. of North America v. Forty-Eight Insulation, Inc., 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 659 F.2d 814 (1981), *cert. denied*, 50 U.S.L.W. 3466 (U.S. Dec. 7, 1981) (Nos. 81-198 and 81-199)	3
Porter v. American Optical Corp., 651 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (U.S. Dec. 7, 1981) (No. 81-200)	3
West v. American Telephone & Telegraph Co., 311 U.S. 223 (1940)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1197

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Since the Petition for Certiorari was filed by Hartford Accident & Indemnity Company ("Hartford"), Hartford has learned of an important new development in this case of which this Court should be aware. By Order filed December 21, 1981, it was ordered by the court below, *sua sponte*, that "the Opinion for the Court filed by Senior Circuit Judge Bazelon on October 1, 1981, in the above entitled cases, is hereby amended" in five different respects. A copy of that Order is reproduced in the Appendix hereto.[1] This Order was entered by the Court, *sua sponte*, over one month after a petition for rehearing—which raised three of the issues on which the

[1] Although the Court of Appeals' Order was entered on December 21, 1981, it was not received by counsel for Hartford until after the printing of the petition for certiorari filed with this Court on December 24, 1981.

Court subsequently modified its opinion—had been nevertheless denied.

Despite the denial of rehearing by the court below, the *sua sponte* amendments in fact changed the opinion substantially and in apparent response to the petitions for rehearing. Three of the amendments [2] go to the heart of the case and involve issues contained in the pending petitions for certiorari in this case.[3] Rather than obviating the need for a writ of certiorari by the Court, the amendments of the court below have instead made certiorari all the more necessary by making explicit the errors which remain the basis of the Court of Appeals' opinion. Each of these amendments will be examined below in the order in which the issues were first presented in Hartford's petition for a writ of certiorari.

1. In its petition for a writ of certiorari, Hartford stated, as its second argument in support of the petition, that "the court below violated accepted limits on appellate review and denied petitioner due process of law by reversing the decision of the district court based on an independent factual finding [concerning "exposure-in-residence"] which was not even before the district court which had denied Respondent's motion to amend its complaint to add this factual allegation." [4] The appellate

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[2] These amendments are the reformulation of "the reasonable expectations of Keene" [p. 13, n.12], the express recognition that Keene did not raise the "exposure-in-residence" argument [p. 23, n.25], and the express recognition that burden of proof is a matter of state law but the refusal to apply that state law [p. 34, n.42].

[3] As of this date, there is one other pending petition for writ of certiorari in this case. Insurance Co. of North America v. Keene Corporation, No. 81-1012 (filed November 30, 1981).

[4] Hartford Petition for Writ of Certiorari ("Hartford Petition") at 10. Similarly, the second question presented for review was:

> 2. Did the court below violate accepted limits on appellate review and deny due process of law by reversing the decision of the district court based on independent factual findings by

court has now amended its opinion to expressly acknowledge what petitioner Hartford previously told this Court in its petition for writ of certiorari—that "Keene did not raise the 'exposure-in-residence' aspect of its argument below." App. 2a, at n.25. This concession is important because "exposure-in-residence" is a critical factual finding on which the court below premised its legal analysis [5] and as to which its legal analysis deviated from the opinions of the Fifth and Sixth Circuits.[6] Nevertheless, despite this belated acknowledgement that the argument was not properly before the appellate court, the court concluded that "[b]ecause we do not rely, however, on any legal or factual aspect of Keene's argument . . . we are not precluded from deciding that exposure in residence triggers coverage." *Id.* The court ignored the critical distinction that if evidence were taken and that evidence were to demonstrate that "exposure in residence" caused no injury, the court would obviously be precluded from deciding what it did—that "exposure in residence triggers coverage." *Id.*

Rather than curing the error in its previous opinion, the amended opinion of the court below makes it even more evident that its decision was an egregious depar-

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the court of appeals concerning issues which were not before the district court and as to which the district court had denied Respondent's motion to amend its complaint.

[5] The significance of a factual finding on "exposure-in-residence" is analyzed in Hartford Petition at 11 n.17. In essence, a factual finding that "exposure-in-residence" causes bodily injury is the necessary factual predicate on which the entire legal analysis of the appellate court is based. Without such a factual finding, there is no rationale to impose liability on insurers whose policy period did not coincide with the exposure period.

[6] Insurance Co. of North America v. Forty-Eight Insulation, Inc., 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 659 F.2d 814 (1981,) *cert. denied*, 50 U.S.L.W. 3466 (U.S. Dec. 7, 1981) (Nos. 81-198 and 81-199); Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (U.S. Dec. 9, 1981) (No. 81-200).

ture from the usual appellate function. The appellate court has explicitly admitted that its decision was based on a factual issue which was not raised in the district court below, which opposing parties thus had no opportunity to address, which was not properly before the appellate court, but which the court nevertheless decided to rely upon. This constitutes a flagrant disregard by the court below of the fundamental limits on appellate review which restrict an appellate court to a review of the record before it and prohibit reversal of a district court decision based on arguments raised for the first time by the appellate court which the losing party could not effectively address.[7] Such limits on appellate review are especially important here, where the new argument relied upon by the Court of Appeals involves *factual* issues concerning "exposure-in-residence" as to which there was no occasion to develop evidence because the district court had denied leave to amend the complaint to even assert this theory.

The amended opinion of the Court of Appeals now makes clear that the appellate court does not consider itself bound by these well-accepted limits on appellate review. The issue could not be presented in clearer terms: the court below has acknowledged that a critical factual argument was not properly before it and yet it has adopted that argument, thereby creating a needless conflict with two other circuit courts of appeal, and a consequent administrative morass for asbestos manufacturers and their insurers. Petitioner Hartford suggests that this precipitous and unprecedented departure from the "accepted and usual course" of appellate proceedings merits review and summary remand. See Rule 17.1(a), S. Ct. Rules.

2. The appellate court has also now recognized that it similarly erred in making a factual finding that Keene

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[7] *See* authorities cited in Hartford Petition at 10 and 12.

had "reasonable expectations" of insurance coverage from exposure through manifestation. App. 1a at n.12. This is a second example of fact-finding by the Court of Appeals which exceeded its traditional appellate function and justifies review under Rule 17.1(a), S. Ct. Rules. As petitioner Hartford stated in its petition,

> The district court made no such finding. Furthermore, there was no factual basis in the record from which to presume such a 'reasonable expectation.' Indeed, this was not Keene's 'reasonable expectation' since Keene's first amended complaint itself was based solely on the theory that exposure triggers coverage. App. D, at 78a, ¶ 28. [Hartford Petition at 12 n.18]

The appellate court has now abandoned the purported "reasonable expectation" of Keene and substituted instead "the expectation that Keene *could have* reasonably formed, as an objective matter, on the basis of the policies' language." App. 1a, at n.12 (emphasis supplied). In essence, it substituted one appellate finding for another. However, both appellate findings show the same defect: they have no support in the record as the actual expectations of Keene.

Rather than ruling on the actual expectations of Keene, the appellate court relied instead on three cases imputing reasonable expectations of the insured as a matter of law where the insured was deceased and his actual expectations could not therefore be ascertained. *See* App. at 12a. Where, as here, the insured is available, his actual expectations are readily apparent as a *factual* matter. To the extent that the amended opinion seeks to substitute a finding on imputed expectations, it is in error because a factual finding on Keene's actual expectations is the appropriate inquiry. Indeed, the record is clear that the *actual* expectation of Keene was never that "exposure-in-residence" caused injury, because Keene did not even think of it until shortly before the close of discovery,

when it belatedly filed a motion for leave to file a second amended complaint asserting this theory, App. E, at 85a *et seq.*, which motion was subsequently denied.[8] Similarly, the record demonstrates that Keene had no expectation that it would receive the benefits of insurance coverage for periods when it purchased no such coverage.

In summary, the two amendments described above well illustrate the pratfalls of appellate fact-finding and the resulting unfairness to litigants, who are denied the opportunity to be heard "at a meaningful time and in a meaningful manner" which the due process clause requires. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). These amendments provide additional support to this Court to exercise its discretion and grant the petition for writ of certiorari.

3. In its petition for a writ of certiorari, Hartford stated as its third argument in support of the petition, that "the court below erroneously reversed the well established state law rule concerning the insured's burden of proof in violation of the *Erie* doctrine as applied to the District of Columbia."[9] The appellate court has now amended its opinion to acknowledge that, as a matter of well-established constitutional principles, "burdens of proof are matters of state law." App. 2a, at n.42. Having already ascertained in its original opinion "that the insured generally bears the burden of proving coverage,"[10] it might have been supposed that the Court of

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[8] App. G, at 118a.

[9] Hartford Petition at 13. Similarly, the third question presented for review was:

> 3. Did the decision of the court below reversing the well-established rule concerning the insured's burden of proof under state decisional law violate the constitutional requirement that state law must be followed in a diversity case. [citation omitted]

[10] App. A, at 34a n.42.

Appeals would do its duty to "apply [the relevant state law] rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law.'" *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940).

However, even after correctly stating the law in its amended opinion, the appellate court refused to follow state law on this issue. Instead, the appellate court relied on its own view of the "superior" rule from the viewpoint of general law. Indeed, the amended opinion states this proposition expressly: "We believe, however, that this case is so different from the cases in which the insured's burden of proof developed, that those cases provide no authority for this case." App. 2a, at n.42. (emphasis supplied). The appellate court thus did not even attempt to apply state law, but instead expressly substituted what it believed to be the better rule. This violated the duty of the court below—which it had explictly recognized in its own amended opinion—to apply state law on the substantive issue of burden of proof.

CONCLUSION

The amended opinion of the court below adds additional weight to the reasons for review already advanced by Hartford. The appellate court now concedes that its opinion rests on factual bases which had not been alleged, were outside the record, and to which Petitioner had no opportunity to respond—but as to which the appellate court asserts that it is within its prerogative to make additional factual findings in violation of the established limits on appellate review, thereby creating a conflict in the circuits and an administrative and legal morass for asbestos manufacturers and their insurers.

Furthermore, the appellate court now concedes, as it must, that burdens of proof are matters of state law, but the appellate court nevertheless continues to rely on its

own belief that the burden of proof should be reversed, in violation of its duty to apply state law.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981

Civil Action No. 78-01011

No. 81-1179

And Consolidated Case Nos. 81-1180, 81-1181 & 81-1182

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA, ET AL.
AETNA CASUALTY AND SURETY COMPANY,
Appellant.

Before: BAZELON, Senior Circuit Judge, WILKEY and WALD, Circuit Judges.

ORDER

IT IS ORDERED, by the Court, *sua sponte*, that the Opinion for the Court filed by Senior Circuit Judge Bazelon on October 1, 1981, in the above entitled cases is hereby amended as follows:

Page 13, note 12: At the end of footnote, delete "the reasonable expectations of Keene" and replace with "the expectations that Keene could have reasonably formed, as an objective matter, on the basis of the policies' language."

Page 14, note 15: Add, "*See also* p. 22 n.24."

Page 22, note 24: Add, "One district court, however, has adopted the manifestation theory. *See*

Eagle-Picher Industries v. Liberty Mut. Ins. Co., Civil Action No. 78-2739-Z (D. Mass., August 14, 1981)."

Page 23, note 25: Add at end, new paragraph: "Keene did not raise the exposure-in-residence aspect of its argument below. Because we do not rely, however, on any legal or factual aspect of Keene's argument, *see* note 19 *infra*, we are not precluded from deciding that exposure in residence triggers coverage."

Page 34, note 42: Add after second sentence: "We recognize that burdens of proof are matters of state law. Dick v. New York Life Ins. Co., 359 U.S. 437, 446 (1959). We believe, however, that this case is so different from the cases in which the insured's burden of proof developed, that those cases provide no authority for this case."

PER CURIAM

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Appendix

81-1197

No.

Office - Supreme Court, U.S.
FILED
DEC 24 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX OF APPENDICES

	Page
Appendix A—Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit and orders denying petitions for rehearing and suggestions for rehearing *en banc*	1a
Appendix B—Opinion of the United States District Court for the District of Columbia	52a
Appendix C—Complaint	61a
Appendix D—First Amended Complaint	73a
Appendix E—Respondent Keene's Motion for Order Granting Leave to File Second Amended Complaint and Second Amended Complaint (April 15, 1980)	85a
Appendix F—Hartford's Opposition to Keene's Motion for Leave to File a Second Amended Complaint (April 25, 1980)	111a
Appendix G—Order dated April 30, 1980 denying in part leave to file second amended Complaint	118a
Appendix H—Companies Affiliated with Petitioner Hartford Accident & Indemnity Company	119a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1179

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA, ET AL.
AETNA CASUALTY AND SURETY COMPANY,
Appellant

No. 81-1180

KEENE CORPORATION,
Appellant

v.

INSURANCE COMPANY OF NORTH AMERICA, ET AL.

No. 81-1181

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA
LIBERTY MUTUAL INSURANCE COMPANY,
Appellant

No. 81-1182

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA,
AETNA CASUALTY AND SURETY COMPANY, ET AL.
Appellant

Appeals from the United States District Court
for the District of Columbia
D.C. Civil Action No. 78-01011)

Argued June 16, 1981

Decided October 1, 1981

John Mahoney, Jr. for Aetna Casualty and Surety Company, appellant in No. 81-1179 and appellee in Nos. 81-1180, 81-1181 and 81-1182.

Eugene R. Anderson with whom *Harold D. Murry, Jr.* and *Jerold Oshinsky* were on the brief for Keene Corporation, appellant in No. 81-1180 and cross/appellee in Nos. 81-1179, 81-1181 and 81-1182.

Robert N. Sayler with whom *Wynne M. Teel, John E. Heintz, Scott D. Gilbert* and *Frank H. Griffin, III* were on the brief for Armstrong World Inc., et al. amici curiae urging reversal in Nos. 81-1179 thru 81-1182.

John P. Arness with whom *David J. Hensler* and *Elliott M. Mincberg* were on the brief for Hartford Accident and Indemnity Company, appellee in Nos. 81-1179 thru 81-1182.

Michael R. Gallagher with whom *Thomas E. Betz, Alan M. Petrov, Dennis M. Flannery* and *John Payton*

were on the brief for Insurance Company of North America appellee in Nos. 81-1179, 81-1180 and 81-1182 and cross/appellant in No. 81-1181.

Gerald V. Weigle, Jr. with whom *Frank W. Gaines, Jr.*, *Robert L. Hoegele* and *Christopher C. Mansfield* were on the brief for Liberty Mutual Insurance Company, appellee in Nos. 81-1179, 81-1180 and 81-1182 and cross/appellant in No. 81-1181.

Robert O. Tyler entered an appearance for Pennsylvania Manufacturers Association Insurance Company, appellee in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

Richard A. Epstein and *Leo A. Roth, Jr.* were on the brief for Federal Insurance Company, et al. Amici Curiae urging reversal in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

Thomas M. Susman was on the brief for Walbrook Insurance Company, LTD., et al. Amici Curiae urging reversal in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

David Booth Beers and *William R. Galeota* were on the brief for Cassiar Resources Limited, Amicus Curiae urging affirmance in part and reversing in part in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

Daniel J. Papeo, Paul D. Kamenar and *Nicholas E. Calio* were on the brief for The Washington Legal Foundation, Amicus Curiae urging remand for full consideration in Nos. 81-1179, 81-1181 and 81-1182.

Richard H. Gimer, M. Stuart Madden and *Donald E. Santarelli* were on the brief for Commercial Union Insurance Companies, Amici Curiae urging remand for full consideration in Nos. 81-1179, 81-1180, 11-1181 and 81-1182.

Before: BAZELON, *Senior Circuit Judge*, WILKEY and WALD, *Circuit Judges*

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

Opinion filed by *Circuit Judge* WALD concurring in part.

BAZELON, *Senior Circuit Judge*: This case arises out of the growing volume of litigation centering upon manufacturers' liability for disease caused by asbestos products. In this action, Keene Corporation (Keene) seeks a declaratory judgment of the rights and obligations of the parties under the comprehensive general liability policies that the defendants issued to Keene or its predecessors [1] from 1961 to 1980. Specifically, Keene seeks a determination of the extent to which each policy covers its liability for asbestos-related diseases.[2]

Between the years 1948 and 1972, Keene manufactured thermal insulation products that contained asbestos. As a result, Keene has been named as a codefendant with several other companies in over 6000 lawsuits alleging injury caused by exposure to Keene's asbestos products. Those cases typically involve insulation installers or their survivors alleging personal injury, or wrongful death, as a result of inhaling asbestos fibers over the course of many years. The plaintiffs in the underlying suits al-

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[1] Keene Corporation was formed in 1967 and subsequently purchased most of the stock of Baldwin-Ehret-Hill, Inc. In 1968, Baldwin-Ehret-Hill became a subsidiary of Keene, and in 1970 it was merged into Keene Building Products Corporation, another Keene subsidiary. All corporations sold thermal insulation products that contained asbestos. Keene's brief at 5-6. All corporations will be referred to as "Keene" for simplicity.

[2] Under Borel v. Fibreboard Paper Prods., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), an asbestos manufacturer such as Keene can be held jointly and severally liable for asbestos-related diseases that were caused, in part, by its products.

lege that they contracted asbestosis, mesothelioma, and/or lung cancer as a result of such inhalation.[3]

From 1961 to the present, Insurance Company of North America (INA), Liberty Mutual Insurance Company (Liberty), Aetna Casualty and Surety Company (Aetna), and Hartford Accident and Indemnity Company (Hartford) issued comprehensive general liability (CGL) insurance policies to Keene. From December 31, 1961 through August 23, 1968, INA insured Keene; from

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[3] Asbestosis is a fibrous condition of the lungs, which is caused by asbestos fibers reaching the alveoli. Once begun, the condition progresses without additional inhalation of asbestos, but it becomes even more serious if inhalation continues. The seriousness of the disease in individual cases depends on the duration and intensity of inhalation and on individual idiosyncrosy. *See* Selikoff, Bader, Bader, Churg, and Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487 (1967); Selikoff, Churg, and Hammond, *The Occurrence of Asbestosis Among Insulation Workers*, 132 ANN. NEW YORK ACAD. SCI. 139 (1965). For a brief discussion of asbestosis, *see* Borel v. Fibreboard Paper Products Corp., *supra* note 2.

Mesothelioma is a malignant tumor of the lining of the lungs or the lining of the peritoneum, which surrounds the organs of the gastrointestinal tract. It is well-established that prolonged inhalation of asbestos fibers causes mesothelioma. The disease can develop many years after inhalation ceases, and can manifest itself several months after it begins to develop.

Lung cancer, or bronchogenic carcinoma, is also generally thought to be caused by prolonged inhalation of asbestos. It too can develop and manifest itself long after inhalation ceases.

The details of the development of these diseases are not relevant to the issues decided below. The only relevant facts are that the diseases develop long after exposure to Keene's products, and that Keene can be held liable for their occurrence.

August 23, 1967 through August 23, 1968, Liberty insured Keene;[4] from August 23, 1968 through August 23, 1971, Aetna insured Keene; from August 23, 1971 through October 1, 1974, Hartford insured Keene; and from October 1, 1974 through October 1, 1980, Liberty insured Keene.[5] The policies that these companies issued to Keene were identical in all relevant respects. The coverage language of the policy that Hartford issued to Keene from 1971 to 1974 is typical. It states that

> [t]he company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as *damages* because of *bodily injury* . . . to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* seeking *damages* on account of such *bodily injury* . . . even if any of the allegations of the suit are groundless, false or fraudulent . . . .

E.g., J.A. II at 627. "Bodily injury" is defined as "bodily injury, sickness or disease sustained by any person," *id.* at 663; and "occurrence" is defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in *bodily injury* . . .

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[4] From August 8, 1967 through August 23, 1968, both INA and Liberty insured Keene. Liberty argues that its 1967-68 policy does not cover Keene's liability for asbestos-related disease. That issue, which the district court decided against Liberty, is addressed in Part III below.

[5] J.A. at 1028-29. From November 1, 1948 through November 1, 1959, Pennsylvania Manufacturers' Association Insurance Co. insured Keene. Whether its policies covered products liability is in dispute in another case. *See* Keene Corp. v. Pennsylvania Manufacturers' Association Insurance Co., Civ. No. 78-1011 (D.D.C. Jan. 30, 1981), *remanded*, No. 81-1248 (D.C.Cir. Oct. 1, 1981).

neither expected nor intended from the stand point of the *insured*. *Id.* at 664.[6]

Keene tendered the asbestos-related damages cases to its insurance companies for defense and indemnification. Each company, however, either denied all responsibility for the suits or accepted only partial responsibility. Memorandum op. at 2 (J.A. IX at 3532).

On June 6, 1978, Keene filed this suit for a declaratory judgment and damages in the United States District Court for the District of Columbia. Keene contended that any stage in the progression of an asbestos-related disease triggers coverage of Keene's entire liability under each of the policies. Aetna, INA, and Liberty argued that coverage is triggered only when bodily injury manifests itself during a policy period. Hartford took an intermediate position, arguing that coverage is triggered by the inhalation of asbestos fibers, but that each company's coverage is determined by the ratio of exposure years during its policy period to the entire period of inhalation.

Keene and Hartford filed motions for partial summary judgment based on their respective theories of coverage, and Aetna filed a motion for summary judgment asserting that no case or controversy had been presented. On January 30, 1981, the district court granted Hartford's motion; it granted in part and denied in part Keene's motion; and it denied Aetna's motion. The district court held that indemnification and defense costs should be prorated among the insurance companies according to the relative extent of exposure during their respective

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[6] For a summary of the differences in coverage language amount of the policies, *see* Appendix A (reproduced from J.A. III at 1031-35). All of the policies are reproduced at J.A. I at 17-245, J.A. II at 537-832, J.A. III at 1036-1202, J.A. IV at 1203-1509). We hold that none of the differences in the policies' language warrants different interpretations in this case.

policy periods. The district court also held that Keene is liable for a pro-rata share of the costs when exposure occurred during a period in which Keene was uninsured. J.A. IX at 3537-38.

Pursuant to 28 U.S.C. § 1292(b) (1976), the district court, *sua sponte*, certified its order for interlocutory appeal. INA, Liberty, Aetna, and Keene filed Petitions for Leave To Appeal, and on February 20, 1981, this court granted those petitions and ordered that the appeals be consolidated and expedited. We reverse the district court's order and remand the case to trial on the issues of damages and on the issue of the applicability of Liberty's 1967 policy.[7]

I. JUSTICIABILITY

Aetna argues that Keene's declaratory judgment action does not present a case or controversy. Aetna asserts that Keene must raise insurance coverage issues in the context of a particular case in which an insurance company has refused to defend or indemnify Keene. We disagree.

The standard for finding a justiciable "case or controversy" in a declaratory judgment action is no less demanding than the standard in any other type of action. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). The dispute "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna, supra*, 300 U.S. at 241. This standard was illuminated by Justice Murphy in *Maryland Casualty Co. v. Pacific Co.*, 312 U.S. 270 (1941), where he stated that "the question [of justiciability] in each case is whether the facts alleged,

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[7] *See* note 4 *supra*.

under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 273. *See generally* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE (1973) § 2757.

This suit by Keene does not present a hypothetical set of facts. Keene has been, and will continue to be, sued for injuries that result from the use of its asbestos products. For each of these suits—past, present, and future—the rights and obligations of Keene and its insurers must be resolved. There can be no question that the interpretation of the contracts at issue in this case presents a "real and substantial controversy" that can be specifically resolved by a decision in this case.

Aetna implies that the rights and obligations created by the insurance policies cannot be determined without consideration of the facts of a particular tort suit. We have before us, however, the terms of the insurance policies and the facts of the particular types of diseases whose coverage is at issue. We are not aware or informed of any facts that would come to light in a particular tort suit that would be relevant to the determination of the policies' applicability to Keene's liability for asbestos-related injury. We hold, therefore, that the case is justiciable.[8]

II. COVERAGE OF THE INSURANCE POLICIES

The language of each policy at issue in this case clearly provides that an "injury," and not the "occurrence" that causes the injury, must fall within a policy period for it to be covered by the policy. Most suits brought under this type of policy involve an injury and an occurrence that transpired simultaneously, or, at least, in close temporal

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[8] Insurance coverage issues are commonly resolved in declaratory judgment actions. *See* WRIGHT & MILLER, *supra*, at 2760.

proximity to one another. In cases involving asbestos-related disease, however, inhalation—the "occurrence" that causes the injury—takes place substantially before the manifestation of the ultimate injury—asbestosis, mesothelioma, or lung cancer.[9] Furthermore, although it is not known how little exposure is required to cause disease, inhalation may occur over a long period of time. As a result, inhalation may continue through numerous policy periods, the disease may develop during subsequent policy periods, and manifestation may occur in yet another policy period. For an insured such as Keene, different insurers are likely to be on the risk at different points in the development of each plaintiff's disease. Moreover, part of the development may occur at a time when no insurer was on the risk. Asbestos-related diseases, which are certainly covered by the policies, therefore differ from most injuries and hence present a difficult problem of contractual interpretation.

Neither the case law [10] nor the terms of the policies lead

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[9] The district court found that 15 or 20 years can pass following an initial inhalation before asbestosis manifests itself. Longer periods of time can pass before mesothelioma or lung cancer manifest themselves. Keene Corp. v. Insurance Co. of N. America, Civ. No. 78-1011 (D.D.C. Jan. 30, 1981) memorandum op. at 3 (J.A. IX at 3533) [hereinafter cited as memorandum op.]. *Accord,* Selikoff, Churg, & Hammond, *supra* note 3.

[10] Jurisdiction in this case exists under 28 U.S.C. § 1332 (1976) by virtue of the diversity of citizenship between the plaintiffs and each of the defendants. We find it unnecessary, however, to reach the issue of the applicable state law. The district court did not address the issue, nor did any of the parties raise the issue. This omission is apparently due to the fact that the potentially applicable state laws do not differ from one another.

Keene is incorporated in Delaware, has its principal place of business in New York, and is licensed to do business in the District of Columbia. INA is incorporated in Pennsylvania and has its principal place of business in Pennsylvania. Aetna is incorporated in Connecticut and has its principal

us directly to a resolution of the coverage issues raised in this case. Unfortunately, the insurance companies failed to develop policy language that would directly address the full complexity entailed by asbestos-related diseases. We have sought, however, to interpret these contracts in a manner that is equitable and administratively feasible and and that is consistent with insurance principles, insurance law, and the terms of the contracts themselves.

We conclude that each insurer on the risk between the initial exposure and the manifestation of disease is liable to Keene for indemnification and defense costs. If possible, the factual predicate for the allocation of costs among insurers should be based on the facts of the underlying tort suit. If, however, the tort doctrine governing the underlying suit does not require proof of facts that would form a sufficient basis upon which to allocate insurance liability, then the necessary facts may be determined independently of that suit.[11]

In construing the policies' coverage of liability for asbestos-related diseases, our objective must be to give ef-

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place of business in Pennsylvania. Hartford is also incorporated in Connecticut and has its principal place of business in Connecticut. And Liberty is incorporated in Massachusetts and has its principal place of business in Massachusetts. None of the laws of these states gives us specific guidance in resolving this case, and the basic principles governing the interpretation of insurance policies are the same in each state. There is thus no conflict of laws. (There is what some have termed—somewhat confusingly—a "false conflict." *See, e.g.*, R. LEFLAR, AMERICAN CONFLICTS OF LAW 188 (3d ed. 1977); Comment, *False Conflicts*, 55 CALIF. L.REV. 74, 113 (1967).) Therefore, we need not engage in the exercise of identifying which jurisdiction's law governs. *See* Waters v. American Automobile Ins. Co., 363 F.2d 684, 687 (D.C.Cir. 1966); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581, 585 (D.C.Cir. 1965).

[11] *See* TAN pp. 32-35 *infra*.

fect to the policies' dominant purpose of indemnity. COUCH ON INSURANCE 2D, §§ 15:22, 15:41 (2d ed. Anderson 1959); 4 WILLISTON ON CONTRACTS, § 900 (3d ed. Jaeger 1959). An insurance contract represents an exchange of an uncertain loss for a certain loss. In a comprehensive general liability insurance policy, the uncertain loss is the possibility of incurring legal liability, and the certain loss is the premium payment. By issuing the policy, the insurer agrees to assume the risk of the insured's liability in exchange for a fixed sum of money. At the heart of the transaction is the insured's purchase of certainty—a valuable commodity. *See* S. HUEBNER, K. BLACK, JR., R. CLINE, PROPERTY AND LIABILITY INSURANCE (2d ed. 1976) 5-7. This view of the insurance policies provides the starting point for analysis.

The next question must be "certainty with respect to what contingencies?" For an insured is only entitled to indemnity for losses that are covered by its policy. We are aided in our analysis of these policies' coverage by the well-accepted rule that ambiguity in an insurance contract must be construed in favor of the insured. *See, e.g., Blue Anchor Overall Co. v. Pennsylvania Lumbermen's Mut. Ins. Co.*, 385 Pa. 394, 123 A.2d 413 (1956); COUCH ON INSURANCE 2D, § 15:14 (2d ed. Anderson 1959); WILLISTON ON CONTRACTS, § 621 (3d ed. Jaeger 1959). We believe, however, that although particular terms of the policies are ambiguous as applied to asbestos-related diseases, the principles embodied in the insurance policies provide a sufficient basis upon which to decide this case. In discerning those principles, our guide is—as it must be—the reasonable expectations of Keene when it purchased the policies. *See, e.g., Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 869-70, 377 P.2d 284, 288-89, 27 Cal.Rptr. 172, 176-77 (1962); *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 305, 208 A.2d 638, 644 (1965); *Collister v. Nationwide Life Ins. Co.*, 479 Pa.

579, 388 A.2d 1346 (1978); COUCH ON INSURANCE 2D, § 15:16 (2d ed. Anderson 1959).[12]

The analysis of the insurers' duty to indemnify Keene is divided into three logical steps: first, the trigger of coverage under the policies; second, the extent of coverage once a policy is triggered; and third, the allocation of liability among insurers if more than one policy is triggered. That analysis is followed by an examination of the insurers' duty to defend Keene and a discussion of the procedural mechanisms by which asbestos-injury suits can be adjudicated.

A. *Trigger of Coverage*

The first step in the analysis of this problem is to determine what events, from the point of exposure to the point of manifestation, trigger coverage under these policies. In the language of the policies, the question is when did "injury" occur? Both Keene and Hartford advance slightly different versions of the "exposure theory" of coverage. Keene argues that successive coverage is triggered by both exposure to asbestos dust ("inhalation ex-

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[12] Professor (now Judge) Keeton has suggested that the legal doctrines governing the construction of insurance contracts fit together under a more general, frequently unstated, principle that can be summarized as follows:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970). Professor Keeton argues that the principle is appropriate in view of the fact that an insurance policy is a contract of adhesion. *Id.* As applied to this case, we agree with Judge Keeton and explicitly base our interpretation of these policies on the reasonable expectations of Keene.

posure")[13] and the subsequent development of disease ("exposure in residence").[14] Keene bases its argument on medical evidence that the body incurs microscopic injury as asbestos fibers become lodged in the lungs and as the surrounding tissue reacts to the fibers thereafter. Hartford also argues that successive coverage is triggered by continued exposure. Its argument is similarly based on the medical evidence of discrete tissue damage as each asbestos fiber reaches the lungs. For no apparent reason, however, Hartford asserts that the continued progression of disease following exposure does not trigger additional coverage.[15] Basing its decision on *Insurance Co. of N. America v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, Nos. 78-1322-1326 (Mar. 9, 1981), the district court adopted Hartford's version of the exposure theory.[16]

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[13] Keene's brief at 18.

[14] *Id.*

[15] Hartford also argues that the extent of an insurer's liability is limited by the proportion of exposure that occurred in its policy period, whereas Keene argues that, once an insurer's policy is triggered, the insurer is liable for the full loss. *See* pp. 24-29 *infra*.

[16] The Fifth Circuit also followed that case in Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981). In Insurance Co. of N. America v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, Nos. 78-1322-1326 (Mar. 9, 1981), the issue of allocating indemnification expenses was not before the court. The district court in that case held that both defense and indemnification costs should be apportioned among the insurers and the insured on a pro-rata basis. Insurance Co. of N. America v. Forty-Eight Insulations, 451 F.Supp. 1230 (E.D.Mich. 1978). The insured, however, only appealed the issue of apportioning defense costs to itself. The Sixth Circuit held that the defense costs should be apportioned on the same basis that the district court used to apportion indemnification costs. In *Porter*, it is unclear whether that court held that the insured must bear a pro-rata share of indemnification and defense costs.

For reasons discussed throughout this opinion, however, we decline to adopt the approach taken in those cases.

INA, Liberty, and Aetna advance the "manifestation" theory of coverage. They argue that coverage is triggered only by the manifestation of either asbestosis, mesothelioma or lung cancer. They assert that their interpretation of the contracts is supported by the ordinary meaning of the terms "bodily injury, sickness or disease." They claim that "bodily injury" does not occur until cellular damage advances to the point of becoming a recognizable disease. INA and Liberty rely on cases in other areas of the law—workmen's compensation, health insurance coverage, and statutes of limitation—that support their interpretation of the term "injury." *E.g.*, *Travelers Insurance Co. v. Cordillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955) (workmen's compensation), *cited in* Liberty's brief at 42-44 and INA's brief at 28; *Reiser v. Metropolitan Life Insurance Co.*, 262 App.Div. 171, 28 N.Y.S.2d 283 (1941) *aff'd*, 289 N.Y. 561, 43 N.E.2d 534 (1942) (health insurance), *cited in* Liberty's brief at 45 and INA's brief at 26; *Urie v. Thompson*, 337 U.S. 163 (1949) (statute of limitations), *cited in* INA's brief at 27.

The policy language does not direct us unambiguously to either the "exposure" or "manifestation" interpretation. In the context of asbestos-related disease, the terms "bodily injury," "sickness" and "disease," standing alone, simply lack the precision necessary to identify a point in the development of a disease at which coverage is triggered. The fact that a doctor would characterize cellular damage as a discrete injury does not necessarily imply that the damage is an "injury" for the purpose of construing the policies. At the same time, the fact that an ordinary person would characterize a fully developed disease as an "injury" does not necessarily imply that the manifestation of the disease is the point of "injury" for purposes of construing the policies. In interpreting a contract, a term's ordinary definition should be given weight, but the definition is only useful when viewed in the context of the contract as a whole.

Moreover, the legal definition of "injury" in other contexts informs the term's definition in this case only if the term operates in a functionally similar manner in the other contexts. In the areas of workmen's compensation, health insurance, and statutes of limitations, the concept of "injury" performs a function that is different from its function in the context of comprehensive general liability policies.[17] Therefore, the term's definition in those con-

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[17] Workmen's compensation cases are only minimally instructive in construing comprehensive general liability policies. Those cases, only some of which adopt the manifestation approach, rely largely on the legislative intent behind workmen's compensation statutes. *See* General Dynamics Corp. v. Benefits Review Board, 565 F.2d 208, 212 (2d Cir. 1977); Travelers Insurance Co. v. Cardillo, 225 F.2d 137, 145 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). The cases that adopt the manifestation approach are based on "the overriding importance of efficient administration" in the workmen's compensation system. *Cardillo, supra*, 225 F.2d at 145. Although administrative feasibility must be one of our concerns in this case, it is not so "overriding" that we would be willing to accept the consequences that it would imply for the contracts before us.

Statute of limitations cases are not at all relevant. The date that a disease is deemed to occur for purposes of statutes of limitations is generally the date of manifestation. *E.g.*, United States v. Kubrick, 444 U.S. 111 (1979). If the date of a disease's origin were to begin statute of limitations periods, meritorious claims would be barred. As a matter of policy, courts have held that the purpose of the statutes of limitations—to protect defendants against stale claims—does not warrant barring such claims. *See, e.g., id.* at 117; Urie v. Thompson, 337 U.S. 163, 169-71 (1949). The considerations involved in those cases have no bearing on the considerations relevant to this case.

The health insurance cases are more relevant to this case. The only problem in those cases, however, is to determine when a disease begins in order to decide whether it began during a policy period. The cases hold that if a disease manifests itself during a policy period, then that policy covers the disease even if the origin of the disease can be traced

texts is only minimally relevant to the question at hand. Instead, the purpose of the insurance policies must inform our construction of the term "injury".

If exposure to asbestos were deemed to constitute a discrete injury and thereby trigger coverage, as Hartford and Keene suggest, the subsequent development of a disease would be characterized best as a consequense of the injury. Future stages of development would not constitute new injuries [18] and therefore would not trigger additional coverage.[19] Under that interpretation, a manufacturer who bought a comprehensive general liability policy would not bear the risk of liability for diseases that occurred

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back to a point in time prior to the policy period. *See, e.g.*, Wilkins v. Grays Harbor Community Hospital, 71 Wash.2d 178, 427 P.2d 716 (1967); Reiser v. Metropolitan Life Insurance Co., 262 App.Div. 171, 28 N.Y.S.2d 283 (1941) *aff'd*, 289 N.Y. 551, 43 N.E.2d 534 (1942). In those cases, the security that the policies provided would be undermined if a disease were *not* covered by the insurer on the risk at the time the disease manifests itself.

The court in *Forty-Eight*, *supra* note 16, expressed a similar opinion concerning the relevance of cases in these areas of the law. 633 F.2d at 1220-22.

[18] This seems to be Hartford's theory. Hartford does not suggest that exposure in residence should trigger coverage.

[19] This would not be true of Keene's characterization of asbestos-related diseases as a series of discrete injuries beginning with inhalation exposure and continuing throughout the development of the disease. That characterization would imply the same conclusion that we reach, although perhaps not when Keene is held jointly and severally liable with other manufacturers. *See* note 20 *infra*. Such a characterization is, however, unnecessarily fact-bound. If a disease could be predicted to develop many years after inhalation of asbestos, yet no cellular changes were known to occur during that period, we would still hold that all policies are triggered from the point of exposure through the point of manifestation. In addition, by beginning with that characterization of the disease, Keene fails to develop the proper rationale for the result it seeks.

due to exposure during a covered period. It would, however, bear the risk of liability for diseases that manifest themselves during the covered period, but that occur because of exposure at a time when the manufacturer held no insurance. As a result, the manufacturer's purchase of insurance would *not* constitute a purchase of certainty with respect to liability for asbestos-related diseases. The insured would remain uncertain as to future liability for injuries whose development began prior to the purchase of insurance. There is no indication that such a de facto exclusion of coverage from the policies was in the contemplation of any party to the contracts in this case. At the least, such an exclusion is inconsistent with Keene's reasonable expectations when it purchased the policies. The policies state that the insured is covered for "injury" during the policy period. In purchasing such coverage, Keene could have reasonably expected that it was covered for all future liability, except liability for injuries of which Keene could have been aware prior to its purchase of insurance. A latent injury, unknown and unknowable to Keene at the time it purchased insurance, must, at least, be covered by an insurer on the risk at the time it manifests itself. Any other result would violate very reasonable expectations of Keene. Therefore we hold that manifestation of disease is one trigger of coverage under the policies.[20]

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[20] The characterization of each exposure as a discrete injury must be rejected for yet another reason. In Borel v. Fibreboard Paper Prods., *supra* note 2., the court held that an asbestos-product manufacturer can be held jointly and severally liable for asbestos-related disease as long as its products had some causal relationship to the development of the disease. That means that a person who used Keene's products for one year, for instance, and then used other manufacturers' asbestos-containing products for several years, could recover damages from Keene for his total loss. If each exposure is considered a separate "injury," under the terms of the policies, one might be able to argue that each insurer

In *American Motorists Ins. Co. v. Squibb*, 95 Misc.2d 222, 406 N.Y.S.2d 658 (1978), the court faced an issue similar to the one in this case, under an insurance policy that was similar in all relevant respects to the policies we have before us. That case involved a drug manufacturer's liability for cancer that was caused by the ingestion of DES by the victims' mothers during pregnancy many years earlier. Squibb argued that the insurance company on the risk at the time of the disease's manifestation was obligated to pay the damages. The insurance company responded by arguing that the injury occurred when the victims' mothers ingested the drug and not when the disease manifested itself. The court held that "bodily injury" occurred when the cancer mani-

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is responsible only for the "injuries" that occurred during its policy periods, even though Keene, in effect, would be liable for "injuries" that occurred outside those policy periods, as a result of exposure to other manufacturers' products. It is unclear whether that is the holding in *Forty-Eight, supra* note 16, 633 F.2d at 1225, or whether that is Hartford's argument. It is clear, however, that such a result would be contrary to the terms of the insurance policies, which explicitly state that the insurer will pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury [during the policy period]." As long as there was either inhalation exposure or exposure in residence during a policy period, and as long as Keene must pay damages as a result, the insurer must indemnify Keene for whatever damages it must pay. That must be true even if Keene is obligated to pay for injury that may have occurred, in part, as a result of exposure to other manufacturers' products. To that extent, the terms of the policies incorporate evolving tort doctrines. The allocation of liability among Keene's insurers is addressed in section II-C, below.

Thus, rather than engaging in further heuristic constructs to avoid this inappropriate result, we have approached this problem in a straightforward manner that avoids the problem from the outset. We treat the diseases at issue in this case as single injuries that occur over extended periods of time.

fested itself. The court stated that "the policy language does not limit coverage to incidents of exposure during the policy period, but rather to conditions which result in bodily injury during the policy period." *Id.* at 659. That court did not have to determine the liability of an insurer that was on the risk prior to the diseases' manifestation.

Thus, if the purpose of the policies is not to be undercut, the manifestation of disease must constitute an "injury". Any characterization of exposure as a *discrete* injury, therefore, must be rejected. This is the same result that courts have reached in determining when an injury or disease begins for purposes of health and accident insurance policies. In those cases, courts have held that a manifestation rule is necessary to protect the reasonable expectations of the insured. *E.g., Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914 (1930); *Cohen v. North American Life & Casualty Co.*, 150 Minn. 507, 185 N.W. 939 (1921). In health and accident insurance policies, as in liability insurance policies, the purpose of the contracts would be defeated if the insured had to bear the risk of disease that is latent at the time a policy is purchased. *See* Comment, *Liability Insurance for Insidious Disease: Who Picks Up the Tab?* 48 FORDHAM L. REV. 657, 671 (1980) (this rule is necessary to provide security policyholder seeks).

None of this implies, however, that insurance policies may not also be triggered prior to manifestation. In fact, we conclude that coverage is also triggered by both inhalation exposure and exposure in residence.

To demonstrate why the policies require that both exposure and manifestation trigger coverage, we begin by positing a rule in which manifestation is the *sole* trigger of coverage. If that interpretation were adopted, as INA, Liberty, and Aetna propose, Keene would not be

covered for diseases manifesting themselves after 1976.[21] By that time, it was widely known that prolonged inhalation of asbestos has a high probability of causing disease.[22] From about then on, insurance companies ceased issuing policies that adequately cover asbestos-releated disease. Yet we can still expect thousands of cases of those diseases to manifest themselves throughout the rest of the century. If we were to hold that only the manifestation of disease can trigger coverage, the insurance companies would have to bear only a fraction of Keene's total liability for asbestos-related diseases.

The possibility of that result would undermine the function of the insurance policies. When Keene purchased the policies, it could have reasonably expected that it was free of the risk of becoming liable for injuries of which it could not have been aware prior to its purchase of insurance.[23] There is no doubt that these losses would be covered if the diseases at issue developed spontaneously upon inhalation. Inhalation of asbestos is an "occurrence" that causes injury for which Keene may be held liable. The possibility that the insurers may not be liable arises solely because there is a period of time between the point at which the injurious process began and the point at which injury manifests itself. In this

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[21] Beginning in 1976, Liberty began using large deductibles and administrative fees for handling asbestos-damage claims. Memorandum op. p.2 n.2, p.6 (J.A. IX at 3532, 3536).

[22] Although asbestosis has been known to man since the early 1900s, *see* note 25 *infra*, the general danger of prolonged exposure to asbestos fibers was not fully recognized until the late 1960s or early 1970s. *See* Insurance Co. of N. America v. Forty-Eight Insulations, *supra* note 16, at 1215. Keene stopped using asbestos in its products at about that time. Memorandum op. p. 1 (J.A. IX at 3531).

[23] *See* p. 18 *supra*.

case, during that interim period, the existence of latent injury among people who had worked with asbestos became predictable with a substantial degree of certainty. The injury and attendant liability became predictable precisely because it was discovered that past occurrences were likely to have set in motion injurious processes for which Keene could be held liable. To accept the argument that *only* manifestation triggers coverage—and allow insurers to terminate coverage prior to the manifestation of many cases of disease—would deprive Keene of the protection it purchased when it entered into the insurance contracts. We, therefore, reject the manifestation theory as presented by INA, Aetna, and Liberty,[24] because it does not allow exposure, as well as manifestation to trigger insurance coverage.

Thus, in order for Keene's rights under the policies to be secure, both inhalation exposure and exposure in residence must also trigger coverage. Regardless of whether exposure to asbestos causes an immediate and discrete injury, the fact that it is part of an injurious process is enough for it to constitute "injury" under the policies.

This conclusion is consistent with the law involving insurance coverage of losses that begin during a period of coverage but continue to develop after a policy's expiration. For example, *Snapp v. State Farm Fire & Cas. Co.*, 206 Cal.App.2d 827, 24 Cal. Rptr. 44 (1962) involved a fire insurance policy that included coverage of most types of physical damage to property. The policy was issued on the plaintiff's house, which had been damaged due to movement of the land under the house. While the land was still unstable, the policy expired, and the insurer sought to limit its liability to the amount of dam-

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[24] The other circuits that have considered this manifestation theory in the context of asbestos-related disease have also rejected the theory. *See* Porter v. American Optical Corp., *supra* note 16; Insurance Co. of No. America v. Forty-Eight Insulations, Inc., *supra* note 16.

age that had occurred prior to the policy's termination date. The court held that the insurer's liability was not so limited, and that it had to indemnify the policyholder for all damage caused until the land movement ceased. The court stated that "[t]o permit the insurer to terminate its liability while the fortuitous peril which materialized during the term of the policy was still active would not be in accord either with applicable precedents or with the common understanding of the nature and purpose of insurance." *See also Harman v. American Cas. Co.*, 155 F. Supp. 612 (S.D. Cal. 1957) (insurer cannot terminate property loss or fire protection while land remains unstable).

These cases illustrate the principle that when it becomes known that an occurrence has set in motion a process that has a significant probability of resulting in a covered loss, the insurer on the risk at that time is liable for the full loss. It does not matter whether the insurer learns of a progressing loss through direct observation, as in *Snapp*, or through statistical inference, as in asbestos-injury cases. It is the use of that knowledge to shift a covered risk back to the insured that is not permitted.[25]

In sum, the allocation of rights and obligations established by the insurance policies, would be undermined if either the exposure to asbestos or the manifestation of asbestos-related disease were the *sole* trigger of coverage. We conclude, therefore, that inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies. We interpret "bodily injury" to mean any part of the single injurious process that asbestos-related diseases entail. We now proceed to consider the

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[25] Theoretically, it would be possible to preserve Keene's rights under the policies if coverage were triggered at the point at which the dangers of asbestos inhalation were discovered. Such an interpretation, however, is not compelled by the terms of the policies and would be impossible to implement.

extent to which an insurer is liable to its policyholder once coverage under its policy is triggered.

B. *The Extent of Coverage*

The policies at issue in this case provide that the insurance company will pay on behalf of Keene "all sums" that Keene becomes legally obligated to pay as damages because of bodily injury during the policy period. We have defined "bodily injury" to mean any part of the injurious process that begins with an initial exposure and ends with manifestation of disease. As a result, when Keene is held liable for an asbestos-related disease, only part of the disease will have developed during any single policy period. The rest of the development may have occurred during another policy period or during a period in which Keene had no insurance. The issue that arises is whether an insurer is liable in full, or in part, for Keene's liability once coverage is triggered. We conclude that the insurer is liable in full, subject to the "other insurance" provisions discussed in section C below.

Hartford argues that each insurer is required to pay only a pro-rata share of Keene's liability. Once an insurer's coverage is triggered, its share would be determined by the duration of a plaintiff's exposure to Keene's products during its policy periods in relation to the entire duration of the plaintiff's exposure to Keene's products. Under Hartford's scheme, if there is a period of exposure during which Keene is uninsured, then Keene would bear a pro-rata share of the liability. [26]

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[26] Apparently, the formula Hartford would propose is the following:

$$\text{Insurance company X's pro-rata share} = \frac{\text{number of years of exposure to Keene's products during company X's policy period}}{\text{Total number of years of exposure to Keene's products}} \times \text{Keene's total liability}$$

But see note 20 *supra*. Hartford argues that only inhalation exposure should be taken into account in prorating liability.

Hartford's argument is based on its characterization of asbestos-related diseases as consisting of a multitude of discrete injuries to the lung tissue. We have declined, however, to rely on that factual characterization in determining the trigger of insurance coverage,[27] and we decline to rely on it in determining the extent of coverage. Instead, we continue to rely on the terms of the contracts and the principles they embody.

Our starting point is the interpretation of the policies as the insurers' promises of certainty to Keene. The policies that were issued to Keene relieved Keene of the risk of liability for latent injury of which Keene could not be aware when it purchased insurance. Keene did not expect, nor should it have expected, that its security was undermined by the existence of prior periods in which it was uninsured, and in which no known or knowable injury occurred.[28] If, however, an insurer were obligated to pay only a pro-rata share of Keene's liability, as the district court held, those reasonable expectations would be

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[27] *See* pp. 17-18 & n.20 *supra*.

[28] *See* p. 18 and 23 *supra*.

The possibility of injury as a result of prolonged exposure to a substance was not unknown at the time these policies were issued. Cases of asbestosis were reported among asbestos textile workers early in the twentieth century, and by the 1930s it was well recognized that prolonged exposure to asbestos causes the disease. *See* Borel v. Fibreboard Paper Products Corp., *supra* note 2. *See generally* Selikoff, Churg, and Hammond, *supra* note 3 (discussion of asbestosis). Moreover, most of the policies explicitly recognize continuous exposure to certain conditions as an occurrence that can result in injury. They provide that such exposure within a single policy period is considered a single occurrence for purposes of the limit of liability provisions. Yet none of the policies provided that the insurer's liability would be limited in any way when exposure extends over several policy periods. The absence of such a provision supports our view that Keene could have reasonably expected *complete* security from each policy it purchased.

violated. Keene's security would be contingent on the existence and validity of all the other applicable policies. Each policy, therefore, would fail to serve its function of relieving Keene of all risk of liability. The logical consequence of this is that the policies must require that once an insurer's coverage is triggered, the insurer is liable to Keene to the full extent of Keene's liability up to its policy's limits, but subject to "other insurance" clauses, discussed in section C, below.

Judge Wald suggests that the rationale of our decision is consistent with prorating insurance obligations to Keene for the years in which it was not insured. Judge Wald believes such a pro-rata allocation is fair, and we do not think her view is unreasonable. As we have just shown, however, such an allocation is inconsistent with the terms and underlying principles of the insurance policies at issue in this case.

We read Judge Wald's reasoning as follows: 1) As the court interprets the term, an asbestos-related "injury" occurs over a long period of time; 2) if Keene was uninsured during part of that time, then Keene is not covered for the full injury; 3) therefore, Keene should pay a pro-rata share of its own liability.

If we read Judge Wald correctly, her position is problematic. Although we have defined the term "injury," we have done so only as an incidental aspect of a logically prior determination of Keene's rights under the policies viewed in their entirety. The insurance policies provide Keene with the right to be free of all liability for asbestos-related disease, unless such a disease was known or knowable by Keene at the time it purchased an insurance policy.[29] For that right to be preserved, each policy

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[29] *See* pp. 18, 21 *supra*.

As Judge Wald points out, concurring op. at p. 3 n.7, this interpretation of the policies provides the basis of our entire decision. She is correct in pointing out that it is an "indispensable initial premise of the liability theory [that we

that Keene purchased between an initial exposure and the ultimate manifestation of a disease must be triggered. In a sense, that means that "injury" occurred during each of the policy periods. It does not mean, however, that there was some "injury" that did *not* occur during a policy period. That conclusion and the implication that the insurers are not obligated to indemnify Keene in full contradicts the first and foremost aspect of our decision—our holding that each policy provides Keene with the right to be free of liability for asbestos-related disease.

As stated above, each policy has a built-in trigger of coverage. Once triggered, each policy covers Keene's liability. There is *nothing* in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period. As we interpret the policies, they cover Keene's entire liability once they are triggered. That interpretation is based on the terms of the policies themselves. We have no authority upon which to pretend that Keene also has a "self-insurance" policy that is triggered for periods in which no other policy was purchased. Even if we had the authority, what would we pretend that the policy provides? What would its limits be? There are no self-insurance policies, and we respectfully submit that the contracts before us do not support judicial creation of such additional insurance policies.

Hartford argues that this allocation of liability allows Keene to "enjoy the benefits of insurance coverage which

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espouse]." *Id.* We rest our interpretation on the terms and principles of the insurance policies in issue. *See* pp. 18, 21 *supra*. Judge Wald's reliance on fairness in support of an alternative—but unstated—basic premise is appealing. *Id.* However, the contracts at issue in this case do not warrant such an independent appeal to fairness as a basis for deciding to allocate liability among all of the parties. At the same time, we see nothing unfair in holding that Keene is fully covered by each of the policies that it purchased.

it has never paid for." Hartford's brief at 31.[30] The contrary point, however, is more accurate: For an insurer to be only partially liable for an injury that occurred, in part, during its policy period would *deprive* Keene of insurance coverage for which it paid. With each policy, Keene paid for insurance against all liability for bodily injury. The policies do not distinguish between injury that is caused by occurrences that continue to transpire over a long period of time and more common types of injury.[31] Nor do the policies provide that "injury" must occur *entirely* during the policy period for full indemnity to be provided.

In support of its argument for pro-rata apportionment of liability, Hartford asserts that the liability scheme we now adopt would leave an insured equally off with one year of insurance coverage as it would be with several years of coverage. *Id.* That assertion is inapposite for two reasons. First, as a matter of probability, the more years of coverage that an insured has purchased, the smaller will be the number of injuries for which it will be liable. An insured will not be covered for an injury if it has insurance neither when a plaintiff's disease was developing nor when the disease manifested itself.[32] Second, and perhaps more important, because we hold below that only one policy's limits of liability may apply to one injury,[33] an insured who has purchased several policies

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[30] The Sixth Circuit made the same point in Insurance Co. of N. America v. Forty-Eight Insulations, *supra* note 16, at 1225.

[31] This omission is particularly significant in the policies that explicitly recognize the possibility that injury can be caused by prolonged exposure to certain conditions. *See* note 28 *supra*.

[32] We recognize, however, that there is not a linear relationship between the number of years of coverage and the number of injuries that can be expected to be covered.

[33] *See* p. 29 *infra*.

that cover an injury will only be able to collect under one of those policies, even though he paid for several. Therefore, it is the insurer—not the insured—who reaps the most benefit from the similarity of treatment between an insured with one year of coverage and an insured with several years of coverage.[34]

Not surprisingly, the policies do not explicitly provide a means of applying the limits of liability to injuries that are covered by multiple policies. Keene claims that it is entitled to full indemnity for each injury up to the sum of the limits provided by the applicable policies. We do not agree. The principle of indemnity implicit in the policies requires that successive policies cover single asbestos-related injuries. That principle, however, does not require that Keene be entitled to "stack" applicable policies' limits of liability. To the extent possible, we have tried to construe the policies in such a way that the insurers' contractual obligations for asbestos-related diseases are the same as their obligations for other injuries. Keene is entitled to nothing more. Therefore, we hold that only one policy's limits can apply to each injury. Keene may select the policy under which it is to be indemnified. *Cf. Forty-Eight, supra*, 633 F.2d at 1226 n.28.

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[34] We are further supported in our conclusion by the fact that Keene could be held fully liable for an asbestos-related injury even if a plaintiff's exposure to Keene's products was minimal compared to his or her exposure to other manufacturer's products. *See Borel, supra* note 2. If Keene were held fully liable under such circumstances, there would be no question but that whatever insurer was on the risk at that time could be held fully liable to Keene. Given that, it does not require too great a leap of logic to hold fully liable any insurer whose policy covers a particular injury. We need not confront the issue of an insurer's obligation if an injury for which the insured can be held liable is not indivisible as the diseases at issue in this case are.

C. *Allocation of Liability*

In any suit against Keene for an asbestos-related disease, it is likely that the coverage of more than one insurer will be triggered. Because each insurer is fully liable, and because Keene cannot collect more than it owes in damages, the issue of dividing insurance obligations arises. The only logical resolution of this issue is for Keene to be able to collect from any insurer whose coverage is triggered, the full amount of indemnity that it is due, subject only to the provisions in the policies that govern the allocation of liability when more than one policy covers an injury. That is the only way that Keene can be assured the security that it purchased with each policy. Our holding each insurer fully liable to Keene is also consistent with other courts' allocation of liability when more than one insurer covers an indivisible loss. *E.g., Groul Construction Co. v. Insurance Company of North America*, 11 Wash.App. 632, 524 P.2d 427 (1974) (continuous damage to property insurance policy).

This does not mean that a single insurer will be saddled with full liability for any injury. When more than one policy applies to a loss, the "other insurance" provisions of each policy provide a scheme by which the insurers' liability is to be apportioned. For instance, INA's policy states:

> When both this insurance and other insurance apply to the loss on the same basis, whether primary, excessive or contingent, INA shall not be liable under this policy for a greater proportion of the loss than stated in the applicable contribution provision below.

J.A. II at 551. The contribution provision referred to contains formulae for "contribution by equal shares" and for "contribution by limits," depending upon the pro-

visions of other applicable policies.[35] These provisions of the policies must govern the allocation of liability among the insurers in any particular case of asbestos-related disease. However, the primary duty of the insurers whose coverage is triggered by exposure or manifestation is to ensure that Keene is indemnified in full.[36]

D. *Costs of Defending Suits Against Keene*

The policies provide that the insurer shall defend any suit against Keene for damages due to bodily injury, even if the suit is groundless, false or fraudulent. The insurers' duty to defend Keene and to pay Keene for its defense costs are more broad than their duty to indemnify Keene. As long as a complaint indicates that Keene may be liable for an injury, an insurer must defend

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[35] *E.g.*,

> (a) Contribution by Equal Shares. If all of such other valid and collectible insurance provides for contribution by equal shares, INA shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each insurer has paid its limit in full or the full amount of the loss is paid.
>
> (b) Contribution by Limits. If any of such other insurance does not provide for contribution by equal shares, INA shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

J.A. II at 551.

In addition, nothing we hold today bars insurers from collecting from one another under the doctrine of contribution.

[36] The procedure by which this duty can be enforced is discussed in section E, below.

Keene if the facts alleged in the complaint indicate that its policy covers the alleged injury. Because we hold that each insurer is fully liable to Keene for indemnification, it follows that each is fully liable for defense costs.[37]

Of course, only the insurer that Keene selects will defend Keene. The duty of that insurer is simply to defend Keene, not to minimize its own liability. As we state below, the factual basis of the insurers' contract obligations may be developed independently of the factual basis of the tort suit. If it is possible to resolve both the tort dispute and the insurance contract dispute together, without disrupting the tort victim's suit and without imposing undue inconvenience on the victim, a trial court may do so. Otherwise the two disputes should be resolved separately. This should eliminate the possibility that the insurer that represents Keene at trial will attempt to skew the factual record to the disadvantages of other insurers.[38]

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[37] Nothing we now hold should be read to prevent an insurer from sharing the costs of defense with other insurers under the "other insurance" clauses or under the doctrine of contribution.

[38] The construction that we adopt today should lead to far less complex tort suits than the district court's construction would have provoked. If each insurer and Keene had to bear pro-rata shares of total damage awards, all of them would have to join the other defendants (and their insurers) in each tort suit. Each suit would thus become an unwieldy spectacle. Within the plaintiff's suit for damages, groups of defendants would pursue disputes with each other. That result, which is not required by the contracts, would impose unnecessarily high costs on all parties—particularly the victim, who should not have to bear any of the cost of a dispute among Keene's insurers or between Keene and its insurers. We expect that these suits will be litigated more efficiently under the liability scheme we set forth today.

It should also be noted that we are not requiring that the company that defends Keene must also be the company whose policy limits determine the extent to which Keene may be indemnified. *See* p. 29 *supra*.

E. *Resolution of Factual Issues*

In a typical suit for products liability, the same set of facts would prove both the manufacturer's tort liability and the insurer's contractual liability. That is not true of suits that arise out of an asbestos-related disease. The leading case concerning manufacturers' liability for asbestos damage claims is *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied* 419 U.S. 896 (1974). The court in *Borel* held that each manufacturer who contributed in any way, and at any time, to a claimant's bodily injury is fully liable for all of the resulting damages. If a victim was exposed to the products of more than one manufacturer, each manufacturer is jointly and severally liable to the victim. *See also Karjala v. Johns Manville Products Corp.*, 523 F.2d 155 (8th Cir. 1975). As a result, a plaintiff in a suit against Keene need not prove the full extent of his or her exposure to asbestos. Yet that set of facts is essential to determining which policies cover Keene's liability.

The doctrine of joint and several tort liability in this context is an accepted means of vindicating the rights of the tort victims. Nothing that we decide concerning the contractual liability of the insurers to Keene should impair the tort plaintiff's prosecution of his or her suit.[39]

Thus initially, the full insurance obligation to Keene must be divided among the insurers whose policies are triggered based on the facts brought out in the tort suit against Keene. The possibility of additional coverage can be determined consensually among insurers, or it can

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[39] This would also be true of other underlying tort doctrines such as enterprise liability, *e.g.*, Hall v. E.I. du Pont de Nemours, 345 F.Supp. 353 (E.D.N.Y. 1972), or market 588, 607 P.2d 924, 163 Cal.Rptr. 132, *cert. denied*, 449 U.S. 912 share liability, *e.g.*, Sindell v. Abbott Laboratories, 26 Cal.3d (1980). *See generally*, Comment, 57 N.D.L. Rev. 81 (1981).

be adjudicated among insurers in a subsequent law suit. At that point the insurance obligations can be reallocated among all the insurers whose policies are found to cover a particular injury.[40] Any facts concerning the period of exposure or the point of manifestation that are proved in an underlying tort suit need not be legally dispositive of a dispute among insurers concerning allocation of their liability. Perhaps if the underlying tort suit would not be disputed and the plaintiff would not be put to undue inconvenience, the factual record needed to allocate insurance responsibility may be developed during the course of the underlying tort suit.[41]

If a victim sues more than one asbestos-product manufacturer, it may be impossible to prove which company's products were used at which time. If so, it will be impossible to prove that exposure to Keene's products—as opposed to those of another manufacturer—occurred during a particular time period. In such a case, there should be a presumption that throughout the victim's period of exposure to asbestos he or she was exposed to Keene's and the other manufacturers' products. The insurer defending Keene in the underlying tort suits may then try to show that Keene's products could not have been involved for certain years.[42] Similarly, if a suit arises to

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[40] *See* Comment, *Liability Insurance for Insidious Disease: Who Picks Up the Tab?*, 48 FORDHAM L.REV. 657, 691-92 (1980).

[41] Preferably this would be done by affidavit or deposition.

[42] We recognize that the insured generally bears the burden of proving coverage. The injuries at issue in these cases, however, are unique and traditional procedural rules cannot be allowed to defeat Keene's or its insurers' substantive rights under the policies. Reversal of the ordinary burden of proof will be more equitable for all parties and will prevent unnecessary litigation. The Sixth Circuit, in Insurance Co. of N. America v. Forty-Eight Insulation, *supra* note 16, also set out this procedure for litigating multiple-defendant suits for asbestos-related disease.

resolve the allocation of insurance liability, any insurance company can try to prove that there was no inhalation of Keene's asbestos during or before its policy period. If an insurance company does so, then that company will be free of liability.

III. Liberty's 1967-68 Policy

The district court included Liberty's 1967-68 policy among the policies that potentially cover Keene's liability for asbestos-related injury.[43] Liberty argues that the policy does not cover Keene's liability for injuries caused by the products of its former subsidiary Baldwin-Ehret-Hill. In opposition to Keene's motion for summary judgment, Liberty submitted affidavits to support its position. Liberty also argues that if the policies did cover Baldwin-Ehret-Hill, that facet of their coverage was conveyed to Gale Corporation when Keene sold Baldwin-Ehret-Hill to Gale.[44] Keene responds by arguing that Endorsement No. 1 of the policy provides for coverage of any subsidiary in which Keene owned more than a fifty-percent interest.[45] In February 1968, Keene acquired more than fifty percent of Baldwin-Ehret-Hill's stock. Therefore, Keene argues, Baldwin-Ehret-Hill was covered by Liberty's policy.

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[43] Memorandum op. at 3 (J.A. IX at 3532).

[44] Liberty's brief at 63-65.

[45] Keene's reply brief at 27-28. Endorsement No. 1 reads as follows:

> [t]he term named insured includes in addition to the person or corporation named in Item 1 of the declarations any business entity . . . while the person or organization named in Item 1 of the declarations . . . owns, during the policy period, an interest in such entity of more than fifty-percent (50%).

J.A. III at 1047.

We hold that there was before the district court a genuine issue of material fact on this point. Therefore, the district court erred in including the issue in its summary judgment order.

CONCLUSION

In view of the above, we reverse the district court's order of summary judgment. The district court should enter a judgment and institute further proceedings consistent with this opinion.

So ordered.

Appendix A: Variations in Policy Language *

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
INA	12/31/61-12/31/64 **	To pay on behalf of the insured . . . damages because of bodily injury . . . arising out of . . . all . . . operations [other than automobile] of the insured	[T]he company shall . . . defend any suit against the insured alleging such injury . . . even if such suit is groundless, false or fraudulent	The words "bodily injury" . . . mean bodily injury, sickness, disease	This policy applies only to occurrences or accidents which take place during the policy period
	1/1/65-1/1/68	Same	Same	Same	Same
	1/1/68-8/23/68	INA will pay on behalf of the Insured . . . damages because of personal injury . . . to which this insurance applies, caused by an occurrence	INA shall have the right and duty to defend any suit against the Insured seeking damages on account of such personal injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	[P]ersonal injury means . . . bodily injury, disability "[B]odily injury" means bodily injury, sickness or disease sustained by any person (Definition of "occurrence" applies only to property damage)	This insurance applies only to personal injury . . . which occurs during the policy period

* Source: J.A. III at 1081-85.
** All policy provisions are taken from the 1/1/65-1/1/68 policy.

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
Liberty Mutual	5/23/67-5/23/68*	The company will pay on behalf of the insured . . . damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness or disease . . . which occurs during the policy period "[O]ccurrence" means an accident including continuous or repeated exposure to conditions which results in bodily injury	Not relevant
Aetna	5/23/68-5/23/71	The company will pay on behalf of the insured . . . damages because of bodily injury . . . to which this insurance applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness or disease "[O]ccurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury	This insurance applies only to bodily injury . . . which occurs during the policy period

* All policy provisions are taken from the 10/1/74-10/1/75 policy.

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
Hartford	8/23/71-8/23/72	The company will pay on behalf of the insured . . . damages because of . . . bodily injury . . . to which this insurance applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness or disease "[O]ccurrence" means an event including injurious exposure to conditions which result, during the policy period in bodily injury	This insurance applies only to bodily injury . . . which occurs during the policy period
	8/23/72-8/23/73	Same	Same	Same	Same
	8/23/73-10/1/74	Same	Same	"[B]odily injury" means bodily injury, sickness or disease . . . which occurs during the policy period "[O]ccurrence" means an event including injurious exposure to conditions which result, during the policy period in bodily injury	Same

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
Liberty Mutual	10/1/74-10/1/75	The company will pay on behalf of the insured . . . damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness, or disease . . . which occurs during the policy period "[O]ccurrence" means an accident, including continuous or repeated exposure to conditions which results in bodily injury	Not relevant
	10/1/75-10/1/76 10/1/76-10/1/77	Same The company will pay on behalf of the insured . . . damages because of . . . personal injury* . . . to which this policy applies, caused by an occurrence	Same [T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	Same "Personal injury" means . . . bodily injury "[B]odily injury" means bodily injury, sickness or disease . . . which occurs during the policy period "[O]ccurrence" [as amended] means . . . exposure to conditions which results in "bodily injury" . . . neither expected nor intended from standpoint of the "insured"	Same Not relevant

* The term "personal injury" was substituted, by endorsement, for bodily injury

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
Liberty Mutual	10/1/77-10/1/78	Same	Same	Same	Same
	10/1/78-10/1/79	Same	Same	Same	Same
	10/1/80	Same	Same	Same	Same

Wald, *Circuit Judge*, concurring in part:

This is a case of first impression and, irrespective of how it is resolved, requires a "leap of logic," maj. op. n. 34, from existing precedent, for it concerns diseases about which there is no medical certainty as to precisely how or when they "occur." We do know the prerequisite—exposure to asbestos fibers—and the symptoms that manifest themselves, generally too late for effective treatment. What happens in between is still something of a mystery; why does one exposed person fall victim to the diseases while another does not? This suit is one of several filed in different courts to ascertain the liability of insurers of manufacturing companies when those companies are sued by asbestosis, mesothelioma and lung cancer victims who have been exposed to the companies' products. Two circuits, the Fifth [1] and Sixth,[2] have determined that exposure alone should trigger the insurer's liability.[3] The Sixth Circuit has also determined that the judgment awarded to the victim should be allocated among insurance companies pro rata according to their share of the total risk period during which the manufacturer was insured. If the risk period includes years when the manufacturer was uninsured (or self-insured), the manufacturer must bear a proportional share of the judgment.[4]

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[1] Porter v. American Optical Corp., No. 78-1953 (5th Cir. April 8, 1981 [hereinafter *Porter*].

[2] Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, Nos. 78-1322-1236 (Mar. 9, 1981).

[3] The United States District Court for the District of Massachusetts, however, determined that manifestation triggered coverage. Eagle Picher Industries, Inc. v. Liberty Mutual Insurance Company, et al., Civil Action No. 78-2739-2 (D. Mass. August 14, 1981).

[4] The Fifth Circuit was not forced to resolve the question of whether the insured ought to be included within the pro rata distribution of liability. *Porter*, 641 F.2d at 1145.

The approach taken in the panel opinion here is different from the approaches of other courts in two significant respects. First, it defines the "injury" that triggers insurance coverage not merely as exposure to asbestos fibers or manifestation of the symptoms of asbestosis, mesothelioma or lung cancer, but also—at least in the case of asbestosis—as the process by which the victim's body resists, adapts, and tries to accommodate itself to a foreign matter—a process, which we understand from the medical testimony elicited at trial, is a major, if not primary, factor in the development of asbestosis. In short, the "injury" is taking place every year that the asbestos fiber remains *in situs* until tissue damage in the lungs is significant enough to be detected by X-rays or to produce symptomatic effects of asbestosis, mesothelioma or lung cancer. *See* maj. op. at n.3. I *agree* with this more comprehensive definition of "injury," encompassing the period from initial exposure to manifestation, because it comports with what we know and do not know about the etiology and progress of the diseases. This process-oriented definition not only provides a flexible formula for adjudicating the legal issues associated with asbestos-related diseases, but also sets a useful precedent for other product-exposure injuries, as of yet unknown in origin. Further, the more comprehensive definition will give much needed certainty to the insurance industry, currently rent asunder by advocates of exposure and manifestation, whose fluctuating positions often depend upon their economic interests in a particular case, and by differing judicial rulings which seem to depend at least partially upon the equities of each case.

Second, the majority opinion exempts asbestos manufacturers from all financial responsibility arising from a suit if the manufacturer had purchased insurance

which covered any part of the injury period.[5] I am not able to agree with this aspect of the majority opinion, as it applies to the period *prior* to the time when such coverage could no longer be obtained.[6] I just do not understand why an asbestos manufacturer, which has consciously decided not to insure itself during particular years of the exposure-manifestation period, should have a reasonable expectation that it would be exempt from any liability for injuries that were occurring during the uninsured period. It seems to me logical and fair[7]—as it seemed to the Sixth Circuit and to the trial court here—to distribute the ultimate financial responsibility on a pro rata basis among the various insurance companies on line during the risk period, and to include

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[5] However, if liability exceeds the liability limit of the policy, then the majority would hold the manufacturer liable for the amount exceeding the limit.

[6] I agree, however, that the manufacturer may target one insurance company to defend the suit and that if judgment is awarded for the victim, the targeted insurance company must pay the victim to the extent of coverage and then seek contribution from other on-line insurers. I disagree only to the extent that self-insurers are excluded from contributing.

[7] The majority finds my position "problematic," but that is only because I have not made as long a "leap of logic" as it. Thus, I do not think that "Keene's rights [to be free of all liability] under the policies viewed in their entirety," are so much the product of a "logically prior determination," maj. op. at 26, as they are the indispensable initial premises of the liability theory espoused in the opinion. Since I can find no first premises in the terms of the policies and canons of interpreting insurance policies, I must seek my own first premises in notions of fairness rather than in principles of logic. I cannot agree that it is fair to exempt self-insurers under these circumstances. I recognize the problems of working out the terms of a "self-insurance policy," but we should expect difficulties when we forge new ground. Certainly the majority's position entails its own share of implementation problems.

Keene as a self-insurer for the years when it failed to take out any insurance. This position, advocated by the Hartford Accident and Indemnity Company, is not, as the panel opinion says, maj. op. at 25, based upon a conceptualization of asbestos-related diseases as a multitude of discreet injuries to the victim. Rather, it is based upon the very notion of "injury" adopted by the panel. If asbestos-related diseases are understood as progressive or cumulative, then all those who voluntarily assumed risk during the period when the diseases progressed must share the responsibility for the judgment and this includes self-insurers. If the risk is to be shared only by the insurance companies, a manufacturing company that purchased insurance intermittently during the risk period would be as secure as those prudent companies that continually purchased insurance.

Subject to this concern, I concur with the majority opinion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

Civil Action No. 78-01011

[Filed October 1, 1981]

No. 81-1179

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA, ET AL.
AETNA CASUALTY and SURETY COMPANY,
Appellant

81-1180

KEENE CORPORATION,
Appellant

v.

INSURANCE COMPANY OF NORTH AMERICA, ET AL.

81-1181

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA
LIBERTY MUTUAL INSURANCE COMPANY,
Appellant

81-1182

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA,
Appellant
AETNA CASUALTY AND SURETY COMPANY, ET AL.

Appeals From the United States District Court
for the District of Columbia

Before: BAZELON, Senior Circuit Judge; WILKEY and WALD, Circuit Judges

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgment of the District Court appealed from herein is hereby reversed, and the cases are remanded to the District Court for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: October 1, 1981
Opinion for the Court filed by Senior Circuit Judge Bazelon.
Opinion filed by Circuit Judge Wald concurring in part.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Action No. 78-01011

No. 81-1179

KEENE CORPORATION
v.
INSURANCE COMPANY OF NORTH AMERICA, *et al.*
AETNA CASUALTY and SURETY COMPANY,
Appellant

And Consolidated Case Nos.
81-1180, 81-1181 and 81-1182

ARGUED 6-16-81

Before: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of Liberty Mutual Insurance Company, Hartford and Indemnity Company and Aetna Casualty Company have been circulated to the full Court. A majority of the Court has not yet voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestions are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge MacKinnon would grant the suggestions for rehearing *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1981

Civil Action No. 78-01011

No. 81-1179

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA, *et al.*
AETNA CASUALTY and SURETY COMPANY,
Appellant

And consolidated case Nos.
81-1180, 81-1181, 81-1182

ARGUED 6-16-81

Before: Bazelon, Senior Circuit Judge, Wilkey and Wald, Circuit Judges

ORDER

On consideration of the petitions for rehearing filed by Commercial Union Insurance Companies, Keene Corporation, Liberty Mutual Insurance Company, Aetna Casualty Company, Hartford Accident and Indemnity Company and Insurance Company of North America, it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 78-1011

KEENE CORPORATION,

Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Defendants.

Jan. 30, 1981

Harold D. Murry, Jr., Clifford & Warnke, Eugene R. Anderson, Jerold Oshinsky, Anderson, Baker, Kill & Olick, Washington, D.C., for plaintiff.

John P. Arness, David J. Hensler, Hogan & Hartson, Washington, D.C., for defendant Hartford Accident & Indemnity Co.

Dennis M. Flannery, John Payton, Wilmer & Pickering, Washington, D.C., Michael R. Gallagher, Thomas E. Betz, Gallagher, Sharp, Fulton, Norman & Mollison, Cleveland, Ohio, for defendant Ins. Co. of North America.

John F. Mahoney, Jr., Roger W. Heald, Pledger & Mahoney, Washington, D.C., for defendant Aetna Casualty and Surety Co.

Frank W. Gaines, Robert L. Hoegle, Olwine, Connelly, Chase, O'Donnell & Weyher, Washington, D.C., Gerald V. Weigle, Jr., D. Gary Reed, Dinsmore, Shohl, Coates & Deupree, Cincinnati, Ohio, for defendant Liberty Mutual Ins. Co.

Earl T. Britt, Wayne A. Schaible, Duane, Morris & Heckscher, Philadelphia, Pa., Robert O. Tyler, Williams, Myers & Quiggle, Washington, D.C., for defendant Pennsylvania Manufacturers' Association Ins. Co.

MEMORANDUM OPINION

JUNE L. GREEN, District Judge.

Plaintiff, Keene Corporation (Keene), is a New York corporation licensed to do business in D.C. The defendants, Insurance Company of North America, Aetna Casualty and Surety Company, Hartford Accident & Indemnity Co., Liberty Mutual Insurance Company and Pennsylvania Manufacturers Association, (PMA)[1] are all insurance companies which wrote policies of insurance for general liability for Keene or its subsidiary-predecessors. Plaintiff seeks a declaratory judgment under the policies of the respective defendants.

From time to time, Keene or Keene Building Products Corporation (KBPC), a wholly owned subsidiary, acquired all of the right, title and interest in the following manufacturers of insulation containing asbestos: Ehret Magnesia Manufacturing Co. (Ehret), Baldwin-Hill (B-H) and Baldwin-Ehret-Hill (BEH).

In 1976, Keene closed out all of its thermal insulation products containing asbestos and has neither made nor sold them since that time.

Recently, more than 5,000 cases have been filed against Keene or its predecessors, alleging personal injury or wrongful death as a result of the use of its products which contained asbestos insulating material. The injuries claimed are asbestosis, mesothelioma and bronchogenic carcinoma.

Keene has called upon the defendant insurance companies to defend the suits and indemnify Keene under the general liability policies whether the action is against

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[1] Neither Keene, its predecessor companies, nor PMA has located any policies of insurance, only index cards of policy numbers. The Court has dismissed PMA in a separate opinion filed this date.

Keene, Ehret, B-H, BEH or KBPC. The defendants have failed to do so at considerable cost to Keene for defense and/or settlement of claims.

The insurance companies provided coverage as follows: INA insured BEH from December 31, 1961 through August 23, 1968; Hartford insured Keene and predecessors from August 23, 1971 through October 1, 1974; Liberty insured Keene from August 23, 1967 through August 23, 1968, and again from October 1, 1974 through September 30, 1980, and Aetna insured Keene from August 23, 1968 through October 1, 1971.[2] All of these policies contained products coverage.

Plaintiff has filed a motion for partial summary judgment, leaving for later, the question of damages.

Aetna has alleged that this Court has no jurisdiction to consider the matter. It claims that no case or controversy exists because the 5,000 plus cases have not been impleaded.

A declaratory judgment is an appropriate means for resolving controversies relating to the extent of coverage under a policy of insurance. *Ins. Co. of No. Am. v. Forty-Eight Insulations*, 451 F.Supp. 1230 (1978), *aff'd* 633 F.2d 1212 (6th Cir., 1980); *Friestad v. Travelers Ind. Co.*, 452 Pa. 417, 306 A.2d 295 (1973); *Crown Cork & Seal, Inc. v. Aetna Casualty & Surety Co., et al.*, Pa.Ct. of Common Pleas (Oct. 9, 1980). Moreover, the determination of the respective rights and duties of the various companies is a proper subject for summary judgment.

This Court makes no determination as to the liability or other pertinent matter on the individuals' suits against Keene and its former affiliates. Nothing contained herein shall prevent the insurance company or companies in-

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[2]. Pursuant to the policies in effect on and after October 1, 1976, Liberty has agreed to defend and indemnify Keene on a deductible basis in which Keene bears most of the cost.

volved from raising all pertinent defenses. However, it is a case of controversy when a company which has bought coverage cannot get representation in lawsuits filed against it or indemnification because of arguments between the insurance companies themselves and the insured. The result is that the insured is without the representation it has paid for. Accordingly, Aetna's motion for summary judgment, which the Court more properly treats as a motion to dismiss, is denied.

Liberty, INA and Aetna maintain that *manifestation* of the bodily injury during the policy period triggers the coverage. Keene and Hartford, on the other hand, maintain that *exposure* to asbestos is the controlling policy period for a person who develops one of the asbestos caused ailments. The insurance policies provide coverage for bodily injury caused by an occurrence during the policy period. The Court must therefore decide when the bodily injury occurs in asbestos caused ailments.

This court has heard testimony from two medical experts on asbestos related diseases, both of whom agree that the diseases asbestosis, mesothelioma and bronchogenic carcinoma have origins in concentrated inhalation of asbestos fibers, and that these diseases are cumulative and progressive. The physical symptoms caused by these three diseases do not manifest themselves to an injured individual until years after the initial inhalation of asbestos. With asbestosis, sometimes 15 or 20 years will pass before an individual develops shortness of breath and a cough. The waiting period is even longer with those who develop bronchogenic carcinoma due to asbestos inhalation. However, it is clear that bodily injury has occurred long before these symptoms develop.

The Court will first address the etiology of asbestosis as the overwhelming majority of underlying suits allege injuries due to asbestosis. Dr. Kleinerman attempted to equate the occurrence of the injury or disease in asbestosis with the advanced development of fibrosis, which he

said generally occurs years after exposure.[3] However, he also stated that "any amount of fibrosis constituted injury" which indicates that the initial bodily insult occurs much earlier.

Dr. Gaensler indicated that tissue injury in an individual who develops asbestosis begins "virtually the moment that asbestos fibers [reach] the alveoli", and that a tissue injury could be ascertained by biopsy within 24 to 48 hours after the concentrated inhalation of asbestos. Further, he testified that scarring and the deposition of collagen could occur within weeks of inhalation. As a practical matter, this bodily injury could only be ascertained in its early stages where the patient had died in an accident and an autopsy was performed.

The Court finds that the original bodily injury and insult to the lungs in asbestosis cases occurs at or near the first heavy inhalation of the fibers and continues progressively. Bodily injury is injury to the tissue, not just diagnosable disease. It does not matter that this bodily injury is not diagnosable because of the limitations of medical equipment at the time of the original insult.

While this matter has been pending before this Court, a similar question has been before Chief Judge Feikens of the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit which affirmed his decision. *INA v. Forty-Eight Insulations, supra.*

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[3] Asbestos fibers irritate the extremely delicate lung tissue when inhaled. They land in the alveoli where it is suspected they cause mechanical damage due to their stiffness. Additionally, in an effort to cleanse the lung, macrophages attempt to engulf the fibers. The fibers are too long frequently to be engulfed and the macrophages die, releasing proteolytic enzymes which further damage the lung. The end result of this tissue injury and reaction to the asbestos fibers is the formation of collagen and scar tissue, which is termed fibrosis.

We adopt the reasoning of Circuit Judge Keith who wrote for the majority:

> . . . the proponents of the manifestation theory urge that we treat asbestosis the same as any other disease and that we not make any "special rules" for the cumulative disease situation which asbestosis presents.
>
> We cannot agree. Cumulative disease cases *are* different from the ordinary accident or disease situation. First, the underlying theory of tort liability is that the asbestos manufacturers continually failed to warn the asbestos workers and that, as a result of this, continuous breathing of asbestos particles allowed asbestosis to progress to the point where it caused death or injury. The insurance policies before us are comprehensive general liability policies which are designed to insure the manufacturer against products liability suits. The contracting parties expect coverage to parallel the theory of liability. Otherwise . . . the manufacturer's coverage becomes illusory since the manufacturer will likely be unable to secure any insurance coverage in later years when the disease manifests itself.
>
> Second, a question might exist as to whether the microscopic tissue injury which occurs upon initial inhalation of asbestos should be defined as the occurrence of a "disease" or "bodily injury". However, there is universal medical agreement that the time when asbestosis manifests itself is not the time when the disease occurred. No doctor would say that asbestosis occurred when it was discovered.

Id., 633 F.2d at 1219.

The cases relied upon by the proponents of manifestation are inapposite because they are primarily statute of limitations cases, workers' compensation cases and health insurance cases. *See, Tijsseling v. Gen. Acc. Fire*

& Life Assurance Corp., Ltd., 55 Cal.App.3d 623, 127 Cal.Rptr. 681; *Met. Life Ins. Co. v. Reynolds*, 48 Ariz. 205, 60 P.2d 1070 (1936); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1955) *cert. denied*, 350 U.S. 913, 76 S.Ct. 196, 100 L.Ed. 800 (1955) ("Last employer" or "last exposure" rule). These distinctions have been dealt with in detail by Judge Keith, *INA v. Forty-Eight Insulations, supra*, 633 F.2d at 1220-1222.

Further support for the exposure theory comes from *Tenneco Chemicals v. Employers Mutual Liability Ins. Co.*, 76 Civ. 809 (S.D.N.Y.) (April 8, 1977). In *Tenneco*, plaintiff was injected with a radioactive drug for testing purposes. The drug broke down improperly and plaintiff suffered from radiation exposure for a long period of time. The insurance company covered the drug company starting two years after the injection and the policy expired eleven years before diagnosis. The court held against the insurance company, holding that occurrence coverage was possibly the broadest coverage and that the injury had occurred during the period of insurance coverage. Chief Judge Feikens relied upon this case as does this Court. *INA v. Forty-Eight Insulations, supra*, 451 F.Supp. at 1242.

It should be noted particularly that if the manifestation theory were adopted, manufacturing companies would be unable to buy full products insurance protection. No insurer would undertake to protect completely a company which had exposed uncounted workers to a hazard for a period of years. This refusal would be likely in the instant case because of the probability of thousands of asbestos related injuries or diseases manifesting themselves at some future time.

The unreality of the manifestation theory becomes even clearer when it is realized that in such a situation those companies which were paid premiums to cover the risk at the time of manufacture and exposure would be free and clear from fiscal responsibility. In this connection, it

should be pointed out that the partial insurance available to Keene at the present time calls for large deductible sums at exorbitant premiums.

The Michigan Court limited its opinion to asbestosis, but this Court finds that the exposure to and heavy inhalation of asbestos triggers the insurance coverage for the diseases mesothelioma and bronchogenic carcinoma as well. The link between asbestos and mesothelioma is well-established. Mesothelioma is a cancer of the mesothelial cells which line the chest walls and surround the organs of the chest cavity. It generally occurs 20 years or more after there has been excessive inhalation of asbestos fibers in those individuals who develop it. While it is easily discovered and diagnosed shortly after it develops, there is no satisfactory treatment of the disease and the victim almost always dies within several years of the tumor's initial development. Dr. Gaensler testified that the initial injury leading to the disease occurs when an asbestos fiber travels down the lung's airways, reaches an alveolus on the edge of the lung, perforates the lung, and, with breathing, irritates the tissue. This process can occur within several days, but it may take as long as one to two months.

Bronchogenic carcinoma, a group of tumors that arise from different parts of the lung, is also linked with asbestos inhalation, though it has other known causes. Dr. Gaensler stated that significant asbestos exposure increases a smoker's chances of developing bronchogenic carcinoma five to tenfold.[4] He further testified that the irritation caused by the asbestos fibers, which is a factor in the eventually diagnosed bronchogenic carcinoma, begins immediately on inhalation of asbestos.

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[4] Dr. Gaensler explained that the correlation between asbestos inhalation and bronchogenic carcinoma in non-smokers is not known because of its rare occurrence which makes carrying forth statistically significant studies extremely difficult.

An obligation to defend Keene exists on the part of each insurance company which carried products liability coverage during the period of time in which the claimant alleges he/she was exposed to Keene's or its subsidiary predecessors' asbestos products. Keene asserts that it should not be required to contribute to its defense even if the exposure claimed fell at a time when Keene was uninsured. Keene argues that if it were covered at any time, it should be afforded representation. The Court cannot agree with that argument and finds that Keene stands in the same position as the insurance companies. If the years in question were covered by insurance, then obviously Keene should be both represented and indemnified, but if not, it should pay its pro rata share of both. *INA v. Forty-Eight Insulations, supra,* 633 F.2d at 1224-1225.

For the foregoing reasons, the Court holds that:

Insurance coverage is triggered when an injured claimant is exposed to asbestos products. Each insurance company on the risk during the times of claimant's exposure shall bear its pro rata share of the cost of representation and indemnification for each such claim. The limit of liability for each company shall be based on its maximum limit per occurrence for each such policy. The terms "insurance company". or "each company" shall be equally applicable to Keene if self-insured or uninsured during any of the time in question.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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78 Civ. 78-1011

OBERDORFER, J.

KEENE CORPORATION,
345 Park Avenue
New York, New York 10020
(212) 421-7122

Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA
1600 Arch Street
Philadelphia, Pennsylvania 19101
(215) 241-4000
Serve: Superintendent of Insurance
District of Columbia
614 H Street, N.W.
Washington, D.C.

AETNA CASUALTY AND SURETY COMPANY
151 Farmington Avenue
Hartford, Connecticut 06115
(203) 273-0123
Serve: Superintendent of Insurance
District of Columbia
614 H Street, N.W.
Washington, D.C.

HARTFORD ACCIDENT & INDEMNITY CO.
Hartford Plaza
Hartford, Connecticut 06115
(203) 547-5000
Serve: Superintendent of Insurance
District of Columbia
614 H Street, N.W.
Washington, D.C.

LIBERTY MUTUAL INSURANCE COMPANY
175 Berkeley Street
Boston, Massachusetts 02117
(617) 357-9500
Serve: Superintendent of Insurance
District of Columbia
614 H Street, N.W.
Washington, D.C.

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND FOR DAMAGES

Plaintiff, by its attorneys, complaining of the defendants, alleges:

COUNT I

Identity of Parties

1. Plaintiff is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Delaware and has its principal place of business in New York City (hereinafter referred to as "plaintiff" or "Keene").

2. Upon information and belief, defendant Insurance Company of North America is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Pennsylvania and has its principal place of business in Pennsylvania ("INA").

3. Upon information and belief, defendant The Aetna Casualty and Surety Company is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Connecticut and has its principal place of business in Connecticut ("Aetna").

4. Upon information and belief, defendant The Hartford Accident & Indemnity Co. is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Connecticut and has its principal place of business in Connecticut ("Hartford").

5. Upon information and belief, defendant Liberty Mutual Insurance Company is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Massachusetts and has its principal place of business in Massachusetts ("Liberty").

Jurisdiction

6. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars. Jurisdiction exists under 28 U.S.C. § 1332 by virtue of com-

plete diversity of citizenship between plaintiff and the defendants.

Nature of Action

7. This is a complaint for a Declaratory Judgment that INA, Aetna and Hartford have breached their obligation to defend various suits brought against the plaintiff and that INA, Aetna and Liberty have breached their obligation to indemnify plaintiff against various risks, and also seeks damages.

Allegations Relating to Plaintiff

8. Baldwin-Ehret-Hill, Inc. ("B-E-H") was a Pennsylvania corporation formed in 1959 as a result of the statutory merger of Ehret Magnesia Manufacturing Company, a Pennsylvania corporation and Baldwin-Hill Company, a New Jersey corporation. Pursuant to Title 15 § 1907 of Pennsylvania Statutes Annotated and Title 14:12-5 of the Revised Statutes of New Jersey, then applicable, the rights, powers and privileges of the merged corporations vested in B-E-H, the successor corporation. B-E-H, its predecessors, Ehret Magnesia Manufacturing Company and Baldwin-Hill Company and its successors as described below did manufacture and sell certain insulation products which allegedly contained asbestos. B-E-H and its successors purchased asbestos from suppliers such as Johns-Manville Products Corporation and the United States Government and incorporated such asbestos into its products without changing its characteristics. B-E-H and its successors were a very small factor in the insulation business and did not even operate nationwide.

9. In February 1968, Keene acquired substantially all of the outstanding stock of B-E-H, making B-E-H a subsidiary of Keene. B-E-H was operated as a Keene subsidiary until 1970.

10. In January 1970, there was a statutory merger between B-E-H and a wholly owned subsidiary of Keene

named Keene Building Products Corporation ("KBPC"). KBPC continued to operate the businesses of B-E-H as a subsidiary of Keene. Pursuant to Title 15 § 1907 of Pennsylvania Statutes Annotated and Title 8 § 259 of Delaware Code Annotated, then applicable, the rights, powers and privileges of the merged corporations vested in KBPC, the successor corporation.

11. In October 1974, KBPC transferred a substantial portion of its assets and liabilities to Keene. The transferred assets and liabilities included those which related to the manufacture of insulation products. Those retained by KBPC related to the manufacture of certain noise control products and had nothing whatsoever to do with insulation products. Subsequent to the transfer of assets and liabilities but still in October 1974, the stock of KBPC was sold to a third party, KBPC thus ceasing to be a subsidiary of Keene. The assets acquired by Keene from KBPC were thereafter operated by Keene as a division known as the Keene Insulation and Contracting Division. In 1975 and 1976, the contracting operations of the Keene Insulation and Contracting Division were sold or closed. Keene neither makes nor sells any industrial insulation products containing asbestos.

12. In recent years, over 500 cases have been alleged against plaintiff or its predecessors alleging personal injury or wrongful death from products allegedly containing asbestos manufactured or sold by B-E-H or KBPC. The plaintiffs in those cases are referred to herein as "claimants".

Allegations Relating to Defendants

13. INA is and was at all times mentioned herein engaged in the business of writing liability insurance policies.

14. INA issued an insurance policy to B-E-H, numbered LB-34781, for the period December 31, 1961 through December 31, 1964.

15. INA issued an insurance policy to B-E-H, numbered LAB-18201, for the period January 1, 1965 through December 31, 1967.

16. INA issued an insurance policy to B-E-H, numbered LAB-18725 for the period January 1, 1968 to August 23, 1968.

17. Such policies, LB-34781, LAB-18201 and LAB-18725, are substantially similar and provide, in part, that INA has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos.

18. Aetna was and is at all times mentioned herein in the business of writing liability insurance policies.

19. Aetna issued an insurance policy to plaintiff numbered 72AL 141319 8R(T) for the period August 23, 1968 to August 23, 1971. Such policy provides, in part, that Aetna has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos.

20. Hartford was and is at all times mentioned herein in the business of writing liability insurance policies.

21. Hartford issued an insurance policy to plaintiff numbered 10-C-B302204E for the period August 23, 1971 to October 1, 1974. Such policy provides, in part, that Hartford has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos.

22. Liberty was and is at times mentioned herein in the business of writing liability insurance policies.

23. Liberty issued insurance policies to plaintiff numbered LGI-621-004-095-034/5/6/7/8/9 for the period October 1, 1974 through September 30, 1980. Such policies provide, in part, that Liberty has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos. Pursuant to such policies on and subsequent to October 1, 1976, Liberty has agreed to defend and indemnify plaintiff but on a basis where most of the cost is borne by plaintiff.

24. Pursuant to the terms of their respective policies, INA, Aetna, Hartford and Liberty each contracted and agreed that they had the duty to defend any suit brought against Keene or its predecessors for personal or bodily injury allegedly caused in whole or in part by an occurrence during the policy period of their respective policies, even if the allegations in such suit are groundless, false or fraudulent.

25. Bodily injury includes, in such policies, injury, sickness and disease. In cases of alleged asbestos-related injury, sickness or disease, bodily injury, within the meaning of each of the policies issued by INA, Aetna, Hartford and Liberty to plaintiff and its predecessors, occurs when asbestos fibers are inhaled or ingested and lodge in the lungs or other organs.

26. Occurrence includes, in such policies, an exposure to conditions which result in bodily injury.

27. The insurance policies which are the subject of this complaint are occurrence or accident policies and are not discovery or claims made policies.

28. Alleged bodily injury resulting from alleged exposure to asbestos is claimed to occur after inhalation of asbestos fibers and before manifestation or medical diagnosis.

29. Plaintiff has requested that INA, Aetna, Hartford and Liberty honor their duty to indemnify plaintiff and also to defend any and all lawsuits against plaintiff alleging asbestos-caused injury, sickness, disease or death allegedly from exposure to products containing asbestos, manufactured or sold by B-E-H or KBPC.

30. On or about October 14, 1977 and November 15, 1977, INA erroneously denied that it had a duty to defend any action in which B-E-H was not specifically named as a defendant or to indemnify plaintiff as to any such action. Thus, for example, INA has erroneously contended that if plaintiff is named as "Keene" rather than as "B-E-H" that INA has no duty to indemnify and no duty to defend.

31. Defendant INA also has erroneously asserted that it has no duty to defend any suit brought against an insured such as plaintiff in which it is alleged or established that exposure to asbestos fibers emanating from an insured's products or operations during the policy period caused injury unless it is also alleged or established that an asbestos-related injury was first known or should have been known by the claimant, or was medically diagnosed during the policy period of the policy. Thus, INA contends that its duty to defend depends upon the date of manifestation rather than the dates of exposure.

32. Defendant INA has erroneously asserted that it has no duty to indemnify an insured such as plaintiff for any liability imposed upon the insured for injuries due to exposure, during the policy period, to asbestos fibers emanating from an insured's products or operations unless an asbestos-related injury was first known to or should have been known by the claimant, or was medically diagnosed during the policy period. Thus, INA contends that its duty to indemnify depends upon the date of manifestation rather than the dates of exposure.

33. Defendant INA erroneously has denied and deprived plaintiff of insurance coverage for liability for

any asbestos-related injury and defense of actions brought alleging such liability unless the injury was first manifested, that is, first known by the claimant, should have been known by the claimant; or happened to be medically diagnosed during the policy period of one of its policies.

34. Contrary to the position which it has taken in its dealings with plaintiff, INA itself has sought contribution and litigation expense arrangements with other insurers using periods of exposure and not manifestation or medical diagnosis as the determining factor.

35. The erroneous construction urged by defendant INA, if applied to the policies issued by Aetna, Hartford and Liberty to Keene and its predecessors, would similarly deprive plaintiff of (a) insurance coverage for any injury caused by exposure to asbestos fibers emanating from alleged B-E-H or KBPC asbestos products during the policy period of such policies, and (b) defense of actions brought alleging such injuries, unless the injury was first known by or should have been known by the claimant, or was medically diagnosed during one of those periods.

36. Defendant Aetna has construed and will construe its aforesaid policy in the same erroneous manner that INA has construed its policies both with respect to coverage for indemnity and the duty to defend.

37. Defendant Hartford has construed and will construe its aforesaid policy in the same erroneous manner that INA has construed its policies with respect to the duty to defend.

38. Defendant Liberty has construed and will construe its aforesaid policy in the same erroneous manner that INA has construed its policies with respect to coverage for indemnity.

39. INA, Aetna, Hartford and Liberty each has a duty and obligation to indemnify plaintiff if the plaintiff

is found liable to an injured third party who was exposed to asbestos fibers emanating from the insured's asbestos products or operations or that of its predecessors during the policy periods.

40. INA, Aetna, Hartford and Liberty each owes plaintiff a duty to defend plaintiff with respect to any suit brought against plaintiff or its predecessors in which it is alleged or established that exposure to asbestos fibers emanating from alleged B-E-H or KBPC asbestos products occurred during the policy period of any policy it or its predecessor issued to Keene or B-E-H, and to indemnify plaintiff for any liabilities and expenses plaintiff may incur with respect to any such suit.

41. INA, Aetna, Hartford and Liberty are jointly and severally liable to defend and indemnify plaintiff.

42. A controversy exists between plaintiff and each of the defendants with regard to each defendant's duties and obligations under its respective insurance policies to indemnify plaintiff for liabilities and expenses plaintiff has incurred or may incur in connection with numerous past and pending actions against plaintiff and in connection with similar actions to be filed against plaintiff in the future.

43. A controversy exists between plaintiff and each of the defendants with regard to each defendant's duties and obligations under its respective insurance policies to defend plaintiff with respect to numerous suits in which it has been alleged or established that exposure to asbestos fibers emanating from alleged B-E-H or KBPC asbestos products occurred during the policy periods of such policies.

44. Each defendant has an unlimited obligation to defend and indemnify plaintiff with respect to any case in which it is alleged or establised that claimant was

exposed, at any time during the policy period, to B-E-H or KBPC products allegedly containing asbestos, provided, however, that the duty to indemnify shall in no event exceed the applicable policy limits, if any.

COUNT II

45. Plaintiff repeats and realleges paragraphs 1 through 44 inclusive with the same force and effect as if stated fully herein.

46. Plaintiff has been named as a defendant in many actions filed in various federal and state courts throughout the United States. The claimants in such actions have sought damages for personal injury or wrongful death allegedly resulting from exposure to asbestos fibers, including asbestos fibers emanating from alleged B-E-H or KBPC asbestos products.

47. The claimants in such actions alleged exposure to asbestos fibers emanating from B-E-H or KBPC operations during the various periods in which plaintiff was insured by INA, Aetna, Hartford and Liberty.

48. Plaintiff has incurred and is continuing to incur liabilities in judgments, settlement payments and expenses in defending such actions, and has paid substantial amounts with respect thereto.

49. Each defendant insured is obligated to indemnify plaintiff and is jointly and severally liable with each other defendant insurer for the liabilities and expenses plaintiff has incurred which are attributable to exposure to asbestos fibers emanating from alleged B-E-H or KBPC asbestos products during the policy period of any of the policies it issued to plaintiff or its predecessors.

WHEREFORE, plaintiff requests a judgment declaring its rights under the aforesaid insurance policies,

damages, costs, and such other and further relief as is just and proper.

ANDERSON RUSSELL KILL
& OLICK, P.C.

By /s/ Jerold Oshinsky
/s/ [Illegible]
630 Fifth Avenue
New York, New York 10020
(212) 397-9700

—and—

CLIFFORD, GLASS, MCILWAIN
& FINNEY

By /s/ Harold D. Murray, Jr.
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 298-8686
Attorneys for Plaintiff

Dated: June 1, 1978

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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78 Civ. 78-1011

(Judge Green)

KEENE CORPORATION,

v. *Plaintiff,*

INSURANCE COMPANY OF NORTH AMERICA,
AETNA CASUALTY AND SURETY COMPANY,
HARTFORD ACCIDENT & INDEMNITY CO.,
LIBERTY MUTUAL INSURANCE COMPANY and

PENNSYLVANIA MANUFACTURERS' ASSOCIATION
INSURANCE COMPANY
925 Chestnut Street
Philadelphia, Pennsylvania 19107
(215) 629-5000
Serve: Superintendent of Insurance
District of Columbia
614 H Street, N.W.
Washington, D.C.

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND FOR DAMAGES

Plaintiff, by its attorneys, complaining of the defendants, alleges:

COUNT I

Identity of Parties

1. Plaintiff is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Delaware and has its principal place of business in New York City (hereinafter referred to as "plaintiff" or "Keene").

2. Upon information and belief, defendant Insurance Company of North America is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Pennsylvania and has its principal place of business in Pennsylvania ("INA").

3. Upon information and belief, defendant The Aetna Casualty and Surety Company is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Connecticut and has its principal place of business in Connecticut ("Aetna").

4. Upon information and belief, defendant The Hartford Accident Indemnity Co. is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Connecticut and has its principal place of business in Connecticut ("Hartford").

5. Upon information and belief, defendant Liberty Mutual Insurance Company is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Massachusetts and has its principal place of business in Massachusetts ("Liberty").

6. Upon information and belief, defendant Pennsylvania Manufacturers' Association Insurance Company is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized

under the laws of Pennsylvania and has its principal place of business in Pennsylvania ("PMA").

Jurisdiction

7. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars. Jurisdiction exists under 28 U.S.C. § 1332 by virtue of complete diversity of citizenship between plaintiff and the defendants.

Nature of Action

8. This is a complaint for a Declaratory Judgment that defendants have breached their obligation to defend various suits brought against the plaintiff and that defendants have breached their obligation to indemnify plaintiff against various risks, and also seeks damages.

Allegations Relating to Plaintiff

9. Baldwin-Ehret-Hill, Inc. ("B-E-H") was a Pennsylvania corporation formed in 1959 as a result of the statutory merger of Ehret Magnesia Manufacturing Company, a Pennsylvania corporation and Baldwin-Hill Company, a New Jersey corporation. Pursuant to Title 15 § 1907 of Pennsylvania Statutes Annotated and Title 14:12-5 of the Revised Statutes of New Jersey, then applicable, the rights, powers and privileges of the merged corporations vested in B-E-H, the successor corporation. B-E-H, its predecessors, Ehret Magnesia Manufacturing Company ("Ehret Magnesia") and Baldwin-Hill Company ("Baldwin-Hill") and its successors as described below did manufacture and sell certain insulation products which allegedly contained asbestos. Ehret Magnesia, Baldwin-Hill, B-E-H and its successors purchased asbestos from suppliers such as Johns-Manville Products Corporation and the United States Government and incorporated such asbestos into their products without changing its characteristics. Ehret Magnesia, Baldwin-Hill, B-E-H and its successors were a very small

factor in the insulation business and did not even operate nationwide.

10. In February 1968, Keene acquired substantially all of the outstanding stock of B-E-H, making B-E-H a subsidiary of Keene. B-E-H was operated as a Keene subsidiary until 1970.

11. In January 1970, there was a statutory merger between B-E-H and a wholly-owned subsidiary of Keene named Keene Building Products Corporation ("KBPC"). KBPC continued to operate the business of B-E-H as a subsidiary of Keene. Pursuant to Title 15 § 1907 of Pennsylvania Statutes Annotated and Title 8 § 259 of Delaware Code Annotated, then applicable, the rights, powers and privileges of the merged corporations vested in KBPC, the successor corporation.

12. In October 1974, KBPC transferred a substantial portion of its assets and liabilities to Keene. The transferred assets and liabilities included those which related to the manufacture of insulation products. Those retained by KBPC related to the manufacture of certain noise control products and had nothing whatsoever to do with insulation products. Subsequent to the transfer of assets and liabilities but still in October 1974, the stock of KBPC was sold to a third party, KBPC thus ceasing to be a subsidiary of Keene. The assets acquired by Keene from KBPC were thereafter operated by Keene as a division known as the Keene Insulation and Contracting Division. In 1975 and 1976, the contracting operations of the Keene Insulation and Contracting Division were sold or closed. Keene neither makes nor sells any industrial insulation products containing asbestos.

13. In recent years, over 1,600 cases have been alleged against plaintiff or its predecessors alleging personal injury or wrongful death from products allegedly containing asbestos manufactured or sold by Ehret Magnesia, Baldwin-Hill, B-E-H or KBPC. The plaintiffs in those cases are referred to herein as "claimants".

Allegations Relating to Defendants

14. PMA is and was at all times mentioned herein engaged in the business of writing liability insurance policies.

15. Upon information and belief, PMA issued liability insurance policies to Ehret Magnesia for at least the years 1948-1959.

16. INA is and was at all times mentioned herein engaged in the business of writing liability insurance policies.

17. INA issued an insurance policy to B-E-H, numbered LB-34781, for the period December 31, 1961 through December 31, 1964.

18. INA issued an insurance policy to B-E-H, numbered LAB-18201, for the period January 1, 1965 through December 31, 1967.

19. INA issued an insurance policy to B-E-H, numbered LAB-18725 for the period January 1, 1968 to August 23, 1968.

20. Such policies, LB-34781, LAB-18201 and LAB-18725, are substantially similar and provide, in part, that INA has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos.

21. Aetna was and is at all times mentioned herein in the business of writing liability insurance policies.

22. Aetna issued an insurance policy to plaintiff numbered 72AL 141319 8R(T) for the period August 23, 1968 to August 23, 1971. Such policy provides, in part, that Aetna has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos.

23. Hartford was and is at all times mentioned herein in the business of writing liability insurance policies.

24. Hartford issued an insurance policy to plaintiff numbered 10-C-B302204E for the period August 23, 1971 to October 1, 1974. Such policy provides, in part, that Hartford has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos.

25. Liberty was and is at times mentioned herein in the business of writing liability insurance policies.

26. Liberty issued insurance policies to plaintiff numbered LGI-621-004-095-034/5/6/7/8/9 for the period October 1, 1974 through September 30, 1980. Such policies provide, in part, that Liberty has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos. Pursuant to such policies on and subsequent to October 1, 1976, Liberty has agreed to defend and indemnify plaintiff but on a basis where most of the cost is borne by plaintiff.

27. Pursuant to the terms of their respective policies, defendants INA, Aetna, Hartford and Liberty and upon information and belief, PMA, each contracted and agreed that they had the duty to defend any suit brought against Keene or its predecessors for personal or bodily injury allegedly caused in whole or in part by an/ occurence during the policy period of their respective policies, even if the allegations in such suit are groundless, false or fraudulent.

28. Bodily injury includes, in such policies, injury, sickness and disease. In cases of alleged asbestos-related injury, sickness or disease, bodily injury, within the meaning of each of the policies issued by defendants to plaintiff and its predecessors, occurs when asbestos fibers are inhaled or ingested and lodge in the lungs or other organs.

29. Occurrence includes, in such policies, an exposure to conditions which result in bodily injury.

30. The insurance policies which are the subject of this complaint are occurrence or accident policies and are not discovery or claims made policies.

31. Alleged bodily injury resulting from alleged exposure to asbestos is claimed to occur after inhalation of asbestos fibers and before manifestation or medical diagnosis.

32. Plaintiff has requested that defendants honor their duty to indemnify plaintiff and also to defend any and all lawsuits against plaintiff alleging asbestos-caused injury, sickness, disease or death allegedly from exposure to products containing asbestos, manufactured or sold by Ehret Magnesia, B-E-H or KBPC.

33. On or about October 14, 1977 and November 15, 1977, INA erroneously denied that it had a duty to defend any action in which B-E-H was not specifically named as a defendant or to indemnify plaintiff as to any such action. Thus, for example, INA has erroneously contended that if plaintiff is named as "Keene" rather than as "B-E-H" that INA has no duty to indemnify and no duty to defend.

34. Defendant INA also has erroneously asserted that it has no duty to defend any suit brought against an insured such as plaintiff in which it is alleged or established that exposure to asbestos fibers emanating from an insured's products or operations during the policy period caused injury unless it is also alleged or established that an asbestos-related injury was first known or should have been known by the claimant, or was medically diagnosed during the policy period of the policy. Thus, INA contends that its duty to defend depends upon the date of manifestation rather than the dates of exposure.

35. Defendant INA has erroneously asserted that it has no duty to indemnify an insured such as plaintiff for any liability imposed upon the insured for injuries due to exposure, during the policy period, to asbestos fibers emanating from an insured's products or operations unless an asbestos-related injury was first known to or should have been known by the claimant, or was medically diagnosed during the policy period. Thus, INA contends that its duty to indemnify depends upon the date of manifestation rather than the dates of exposure.

36. Defendant INA erroneously has denied and deprived plaintiff of insurance coverage for liability for an asbestos-related injury and defense of actions brought alleging such liability unless the injury was first manifested, that is, first known by the claimant, should have been known by the claimant, or happened to be medically diagnosed during the policy period of one of its policies.

37. Contrary to the position which it has taken in its dealings with plaintiff, INA itself has sought contribution and litigation expense arrangements with other insurers using periods of exposure and not manifestation or medical diagnosis as the determining factor.

38. The erroneous construction urged by defendant INA, if applied to the policies issued by the other defendants to Keene and its predecessors, would similarly deprive plaintiff of (a) insurance coverage for any injury caused by exposure to asbestos fibers emanating from alleged Ehret Magnesia, B-E-H or KBPC asebstos products during the policy period of such policies, and (b) defense of actions brought alleging such injuries, unless the injury was first known by or should have been known by the claimant, or was medically diagnosed during one of those periods.

39. Defendant Aetna has construed and will construe its aforesaid policy in the same erroneous manner that INA has construed its policies both with respect to coverage for indemnity and the duty to defend.

40. Defendant Hartford has construed and will construe its aforesaid policy in accordance with the exposure principle but seeks to apportion its defense and indemnity obligations.

41. Defendant Liberty has construed and will construe its aforesaid policy in the same erroneous manner that INA has construed its policies with respect to coverage for indemnity and the duty to defend.

42. Plaintiff does not yet know whether PMA will construe its policies in accordance with the exposure principle or manifestation.

43. Defendants each have a duty and obligation to indemnify plaintiff if the plaintiff is found liable to an injured third party who was exposed to asbestos fibers emanating from the insured's asbetos products or operations or that of its predecessors during the policy periods.

44. Defendants each owe plaintiff a duty to defend plaintiff with respect to any suit brought against plaintiff or its predecessors in which it is alleged or established that exposure to asbestos fibers emanating from alleged Ehret Magnesia, B-E-H or KBPC asbestos products occurred during the policy period of any policy it or its predecessor issued to Keene, B-E-H or Ehret Magnesia, and to indemnify plaintiff for any liabilities and expenses plaintiff may incur with respect to any such suit.

45. Defendants are jointly and severally liable to defend and indemnify plaintiff.

46. A controversy exists between plaintiff and each of the defendants with regard to each defendant's duties and obligations under its respective insurance policies to indemnify plaintiff for liabilities and expenses plaintiff has incurred or may incur in connection with numerous past and pending actions against plaintiff and in connection with similar actions to be filed against plaintiff in the future.

47. A controversy exists between plaintiff and each of the defendants with regard to each defendant's duties and obligations under its respective insurance policies to defend plaintiff with respect to numerous suits in which it has been alleged or established that exposure to asbestos fibers emanating from alleged Ehret Magnesia, B-E-H or KBPC asbestos products occurred during the policy periods of such policies.

48. Each defendant has an unlimited obligation to defend and indemnify plaintiff with respect to any case in which it is alleged or established that claimant was exposed, at any time during the policy period, to Ehret Magnesia, B-E-H or KBPC products allegedly containing asbestos, provided, however, that the duty to indemnify shall in no event exceed the applicable policy limits, if any.

COUNT II

49. Plaintiff repeats and realleges paragraphs 1 through 48 inclusive with the same force and effect as if stated fully herein.

50. Plaintiff has been named as a defendant in many actions filed in various federal and state courts throughout the United States. The claimants in such actions have sought damages for personal injury or wrongful death allegedly resulting from exposure to asbestos fibers, including asbestos fibers emanating from alleged Ehret Magnesia, B-E-H or KBPC asbestos products.

51. The claimants in such actions alleged exposure to asbestos fibers emanating from Ehret Magnesia, B-E-H or KBPC operations during the various periods in which plaintiff was insured by defendants.

52. Plaintiff has incurred and is continuing to incur liabilities in judgments, settlement payments and expenses in defending such actions, and has paid substantial amounts with respect thereto.

53. Each defendant insurer is obligated to indemnify plaintiff and is jointly and severally liable with each other defendant insurer for the liabilities and expenses plaintiff has incurred which are attributable to exposure to asbestos fibers emanating from alleged Ehret Magnesia, B-E-H or KBPC asbestos products during the policy period of any of the policies it issued to plaintiff or its predecessors.

WHEREFORE, plaintiff requests a judgment declaring its rights under the aforesaid insurance policies, damages, costs, and such other and further relief as is just and proper.

ANDERSON RUSSELL KILL
& OLICK, P.C.

By /s/ Harold Oshinsky
630 Fifth Avenue
New York, New York 10020
(212) 397-9700

-and-

CLIFFORD & WARNKE

By /s/ Harold D. Murry, Jr.
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 828-4200
Attorneys for Plaintiff

Dated: June 11, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 1979, a copy of Plaintiff Keene Corporation's First Amended Complaint For Declaratory Judgment and For Damages was hand-delivered to:

John P. Arness, Esquire
David J. Hensler, Esquire
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorneys for Defendant Hartford Accident & Indemnity Company

Dennis M. Flannery, Esquire
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
Attorney for Defendant Insurance Company of North America

John F. Mahoney, Jr., Esquire
PLEDGER & MAHONEY
925 Washington Building
Washington, D.C. 20005
Attorney for Defendant Aetna Casualty and Surety Company

Frank W. Gaines, Jr., Esquire
Robert L. Hoegle, Esquire
OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER
1850 K Street, N.W.
Washington, D.C. 20006
Attorneys for Defendant Liberty Mutual Insurance Company

and mailed, first class, postage prepaid, to:

Michael R. Gallagher, Esquire
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GALLAGHER, SHARP, FULTON, NORMAN & MOLLISON
630 Bulkley Building
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Attorneys for Defendant Insurance Company of North America

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DINSMORE, SHOHL, COATES & DEUPREE
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Cincinnati, Ohio 45202
Attorney for Defendant Liberty Mutual Insurance Company

/s/ Harold D. Murry, Jr.
HAROLD D. MURRY, JR.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1011

KEENE CORPORATION,
Plaintiff,
v.

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,
Defendants.

MOTION FOR ORDER GRANTING LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiff Keene Corporation, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure and the accompanying memorandum of points and authorities, moves the Court for an order granting leave for Keene to file its Second Amended Complaint in the form submitted herewith and attached hereto.

Plaintiff seeks to amend its complaint in the following manner:

1. By deleting from paragraph 1 "Delaware" and substituting therefor "New York."

2. By deleting from paragraph 12 "industrial" and substituting therefore "thermal."

3. By deleting from paragraph 13 "over 1,600" and substituting therefore "about 3,000."

4. By deleting paragraph 15 and substituting therefor the following:

"15. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 2440, for the period November 1, 1948 through November 1, 1949."

5. By adding the following paragraphs:

16. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 2971, for the period November 1, 1949 through November 1, 1950.

17. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 3600, for the period November 1, 1950 through November 1, 1951.

18. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 4200, for the period November 1, 1951 through November 1, 1952.

19. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 5050, for the period November 1, 1952 through November 1, 1953.

20. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 5996, for the period November 1, 1953 through November 1, 1954.

21. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 7104, for the period November 1, 1954 through November 1, 1955.

22. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 8301, for the period November 1, 1955 through November 1, 1956.

23. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 9770, for the period November 1, 1956 through November 1, 1957.

24. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL

11338, for the period November 1, 1957 through November 1, 1958.

25. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 13103, for the period November 1, 1958 through November 1, 1959.

26. Such policies provide, in part, that PMA has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos.

6. By adding the following paragraph after paragraph 25 (new 36):

"37. Liberty issued an insurance policy to plaintiff, numbered LGI-121-0222-00-027, for the policy period August 23, 1967 through August 23, 1968."

7. By renumbering paragraphs 16, *et seq.*, in conformity with the above additions.

8. By deleting from paragraph 18 (new 29) "December 31, 1967" and substituting therefor "January 1, 1968."

9. By correcting the Aetna policy number in paragraph 22 (new 33) to read as follows: "72AL141319 SR(Y)."

10. By deleting paragraph 24 (new 35) and substituting therefor the following:

35. Hartford issued the following insurance policies to plaintiff: 10-C-B30200E for the period August 23, 1971 to August 23, 1972; 10-C-B30201E for the period August 23, 1972 to August 23, 1973; and 10-C-B30204E for the period August 23, 1973 to October 1, 1974. Such policies provide, in part, that Hartford has contracted and agreed to indemnify

Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos.

11. By deleting from the second sentence in paragraph 26 (new 38) "such policies" and substituting therefor "All Liberty policies issued to Keene."

12. By deleting paragraphs 27 (new 39) and 28 (new 40) and substituting therefor the following:

39. Pursuant to the terms of their respective policies, defendants INA, Aetna, Hartford, Liberty and PMA, each contracted and agreed that they had the duty to defend any suit brought against Keene or its predecessors for personal or bodily injury allegedly caused in whole or in part by an accident or occurrence during the policy period of their respective policies, even if the allegations in such suit are groundless, false or fraudulent.

40. Bodily injury includes, in such policies, injury, sickness and disease. In cases of alleged asbestos-related injury, sickness or disease, bodily injury within the meaning of the policies issued by defendants to plaintiff and its predecessors occurs when asbestos fibers are inhaled or ingested and lodge in the lungs or other organs and subsequent to such inhalation or ingestion.

13. By adding to paragraph 29 (new 41) "and progressive bodily injury" at the end of the sentence.

14. By adding "or progressive injury" to the end of the last sentence in paragraph 34 (new 46).

15. By deleting "policy" and "the" from paragraph 40 (new 52) and substituting therefor "policies" and "an" respectively.

16. By deleting "policy" from paragraph 41 (new 53) and substituting therefore "policies."

17. By deleting paragraph 42 (new 54) and substituting therefor the following:

"54. Defendant PMA has construed and will construe its aforesaid policies in the same erroneous manner that INA has construed its policies both with respect to coverage for indemnity and the duty to defend."

18. By adding "or incurred progressive injury" before the last phrase "during the policy periods" in paragraph 43 (new 55).

19. By adding "or progressive injury" to paragraph 44 (new 56) so that the paragraph reads as follows:

> 56. Defendants each owe plaintiff a duty to defend plaintiff with respect to any suit brought against plaintiff or its predecessors in which it is alleged or established that exposure to asbestos fibers emanating from alleged Ehret Magnesia, B-E-H or KBPC asbestos products or progressive injury occurred during the policy period of any policy it or its predecessor issued to Keene, B-E-H or Ehret Magnesia, and to indemnify plaintiff for any liabilities and expenses plaintiff may incur with respect to any such suit.

20. By deleting paragraph 45 (new 57) and substituting therefor the following:

"57. Defendants are fully liable to defend and indemnify plaintiff at no cost to Keene whatsoever."

21. By adding "or progressive injury" to paragraph 47 (new 59) so that the paragraph reads as follows:

> 59. A controversy exists between plaintiff and each of the defendants with regard to each defendant's duties and obligations under its respective insurance policies to defend plaintiff with respect to numerous suits in which it has been alleged or established that exposure to asbestos fibers emanating from alleged Ehret Magnesia, B-E-H or KBPC

asbestos products or progressive injury occurred during the policy periods of such policies.

22. By deleting ", provided, however, that the duty to indemnify shall in no event exceed the applicable policy limits if any" from paragraph 48 (new 60) and substituting therefor "or incurred injury as a result thereof."

By adding the following paragraph after paragraph 48 (now 60):

"WHEREFORE, plaintiff requests a judgment declaring its rights under the aforesaid insurance policies, and such other and further relief as is just and proper."

24. By deleting Count II and substituting therefor the following:

COUNT II

61. Plaintiff repeats and realleges paragraphs 1 through 60 inclusive with the same force and effect as if stated fully herein.

62. Plaintiff has been named as a defendant in many actions filed in various federal and state courts throughout the United States. The claimants in such actions have sought damages for personal injury or wrongful death allegedly resulting from exposure to asbestos fibers, including asbestos fibers emanating from alleged Ehret Magnesia, B-E-H or KBPC asbestos products.

63. Each defendant insurer is obligated to indemnify plaintiff if the plaintiff is found liable to an injured third party who was exposed to asbestos fibers emanating from the insured's products or operations or that of its predecessors or incurred progressive injury during the policy period of any of the policies it issued to plaintiff or its predecessors.

64. Each of the defendants has breached its contract of insurance by failing to defend and indemnify Keene in asbestos-related cases.

65. As a direct and proximate result of said breaches, Keene has been deprived of the benefit of insurance coverage from at least 1948 to present, and as of this date has incurred substantial actual damages for the defense of and payments of settlements and judgments in asbestos-related cases. As the total amount of damages is continually increasing, Keene will ask leave of court to amend its complaint to specify the amount of its damages when the exact amount thereof has been ascertained.

66. Keene has been forced to incur and will continue to incur attorneys' fees and expenses in order to prosecute this action for declaratory relief and damages. Keene is entitled to recover these attorneys' fees and expenses.

WHEREFORE, plaintiff requests judgment for (1) compensatory damages according to the proof at trial; (2) consequential damages including, but not limited to, all defense costs, judgments and settlements without regard to policy limits, and reasonable attorneys' fees in the underlying actions, and all reasonable attorneys' fees, expenses and costs incurred in the prosecution of this action; (3) interest according to law; and (4) such other and further relief as the court may deem just and proper.

25. By adding the following:

COUNT III ADDRESSED TO DEFENDANTS INA AND AETNA

67. Plaintiff Keene repeats and realleges paragraphs 1 through 66 inclusive with the same force and effect as if stated fully herein.

68. Implied in each of the defendants' insurance policies is a convenant by each of the said defendants that it will act in good faith and deal mainly with the insured, that it will do nothing to interfere with

the rights of Keene to receive the benefits of each policy, and that it will place the interests of Keene before its own interests.

69. In breach of this covenant, defendants INA and Aetna interpreted their respective insurance policies for the purpose of consciously withholding from Keene the rights and benefits to which Keene is entitled under its policies.

70. INA and Aetna have adopted the manifestation position with full knowledge that said interpretations are incorrect, are contrary to policy language, are inconsistent with the reasonable expectations of defendants' insureds including Keene, are contrary to established claims practices, medical evidence and legal precedent, and constitute bad faith.

71. Defendants INA and Aetna, and each of them, have adopted said interpretations to further their own financial interests at the expense of their insureds including Keene. The actions of these defendants were willful and malicious and were done with the deliberate intent of injuring Keene.

72. As a direct and proximate result of such defendants' bad faith, Keene has been denied a defense and indemnification on the asbestos cases and has been required to prosecute the within action to secure the rights and benefits owing to Keene under its policies of insurance. Keene is entitled to recover said damages from defendants and to recover punitive damages from defendants INA and Aetna in an amount sufficient to punish and make an example of defendants in order to deter such conduct in the future.

73. As a direct and proximate result of each of said defendants' conduct, Keene has been damaged and will continue to suffer damages in the manner

alleged hereinabove. Keene will ask leave of Court to amend its complaint to specify the amount of its damages when the exact amount thereof has been ascertained.

WHEREFORE, plaintiff requests judgment for (1) compensatory damages according to proof at the time of trial; (2) consequential damages including, but not limited to, all defense costs, judgments and settlements without regard to policy limits and reasonable attorneys' fees in the underlying actions, and all reasonable attorneys' fees, expenses and costs incurred in the prosecution of this action; (3) punitive damages; (4) interest according to law; and (5) such other and further relief as the court may deem just and proper.

Respectfully submitted,

ANDERSON RUSSELL KILL
& OLICK, P.C.
Rockefeller Center
630 Fifth Avenue
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(212) 397-9700

—and—

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(202) 828-4200

/s/ Harold D. Murry, Jr.
HAROLD D. MURRY, JR.
Attorneys for Plaintiff

Dated: Washington, D.C.
April 15, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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78 Civ. 78-1011

(Judge Green)

KEENE CORPORATION,

Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA, AETNA CASUALTY AND SURETY COMPANY, HARTFORD ACCIDENT & INDEMNITY CO., LIBERTY MUTUAL INSURANCE COMPANY and PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY,

Defendants.

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND FOR DAMAGES

Plaintiff, by its attorneys, complaining of the defendants, alleges:

COUNT I

Identity of Parties

1. Plaintiff is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of New York and has its principal place of business in New York City hereinafter referred to as "plaintiff" or "Keene").

2. Upon information and belief, defendant Insurance Company of North America is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Pennsylvania and has its principal place of business in Pennsylvania ("INA").

3. Upon information and belief, defendant The Aetna Casualty and Surety Company is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Connecticut and has its principal place of business in Connecticut ("Aetna").

4. Upon information and belief, defendant The Hartford Accident & Indemnity Co. is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Connecticut and has its principal place of business in Connecticut ("Hartford").

5. Upon information and belief, defendant Liberty Mutual Insurance Company is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Massachusetts and has its principal place of business in Massachusetts ("Liberty").

6. Upon information and belief, defendant Pennsylvania Manufacturers' Association Insurance Company is a corporation licensed to do business and doing and transacting business in the District of Columbia, organized under the laws of Pennsylvania and has its principal place of business in Pennsylvania ("PMA").

Jurisdiction

7. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars. Jurisdiction exists under 28 U.S.C. § 1332 by virtue of complete diversity of citizenship between plaintiff and the defendants.

Nature of Action

8. This is a complaint for a Declaratory Judgment that defendants have breached their obligation to defend various suits brought against the plaintiff and that defendants have breached their obligation to indemnify plaintiff against various risks, and also seeks damages.

Allegations Relating to Plaintiff

9. Baldwin-Ehret-Hill, Inc. ("B-E-H") was a Pennsylvania corporation formed in 1959 as a result of the statutory merger of Ehret Magnesia Manufacturing Company, a Pennsylvania corporation and Baldwin-Hill Company, a New Jersey corporation. Pursuant to Title 15 § 1907 of Pennsylvania Statutes Annotated and Title 14:12-5 of the Revised Statutes of New Jersey, then applicable, the rights, powers and privileges of the merged corporations vested in B-E-H, the successor corporation. B-E-H, its predecessors, Ehret Magnesia Manufacturing Company ("Ehret Magnesia") and Baldwin-Hill Company ("Baldwin-Hill") and its successors as described below did manufacture and sell certain insulation products which allegedly contained asbestos. Ehret Magnesia, Baldwin-Hill, B-E-H and its successors purchased asbestos from suppliers such as Johns-Manville Products Corporation and the United States Government and incorporated such asbestos into their products without changing its characteristics. Ehret Magnesia, Baldwin-Hill, B-E-H and its successors were a very small factor in the insulation business and did not even operate nationwide.

10. In February 1968, Keene acquired substantially all of the outstanding stock of B-E-H, making B-E-H a subsidiary of Keene. B-E-H was operated as a Keene subsidiary until 1970.

11. In January 1970, there was a statutory merger between B-E-H and a wholly-owned subsidiary of Keene named Keene Building Products Corporation ("KBPC"). KBPC continued to operate the business of B-E-H as a subsidiary of Keene. Pursuant to Title 15 § 1907 of Pennsylvania Statutes Annotated and Title 8 § 259 of Delaware Code Annotated, then applicable, the rights, powers and privileges of the merged corporations vested in KBPC, the successor corporation.

12. In October 1974, KBPC transferred a substantial portion of its assets and liabilities to Keene. The trans-

ferred assets and liabilities included those which related to the manufacture of insulation products. Those retained by KBPC related to the manufacture of certain noise control products and had nothing whatsoever to do with insulation products. Subsequent to the transfer of assets and liabilities but still in October 1974, the stock of KBPC was sold to a third party, KBPC thus ceasing to be a subsidiary of Keene. The assets acquired by Keene from KBPC were thereafter operated by Keene as a division known as the Keene Insulation and Contracting Division. In 1975 and 1976, the contracting operations of the Keene Insulation and Contracting Division were sold or closed. Keene neither makes nor sells any thermal insulation products containing asbestos.

13. In recent years, about 3,000 cases have been alleged against plaintiff or its predecessors alleging personal injury or wrongful death from products allegedly containing asbestos manufactured or sold by Ehret Magnesia, Baldwin-Hill, B-E-H or KBPC. The plaintiffs in those cases are referred to herein as "claimants".

Allegations Relating to Defendants

14. PMA is and was at all times mentioned herein engaged in the business of writing liability insurance policies.

15. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 2440 for the period November 1, 1948 through November 1, 1949.

16. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 2971, for the period November 1, 1949 through November 1, 1950.

17. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 3600,

for the period November 1, 1950 through November 1, 1951.

18. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 4200, for the period November 1, 1951 through November 1, 1952.

19. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 5050, for the period November 1, 1952 through November 1, 1953.

20. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 5996, for the period November 1, 1953 through November 1, 1954.

21. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 7104, for the period November 1, 1954 through November 1, 1955.

22. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 8301, for the period November 1, 1955 through November 1, 1956.

23. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 9770, for the period November 1, 1956 through November 1, 1957.

24. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 11338, for the period November 1, 1957 through November 1, 1958.

25. PMA issued a comprehensive general liability insurance policy to Ehret Magnesia, numbered CL 13103, for the period November 1, 1958 through November 1, 1959.

26. Such policies provide, in part, that PMA has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos.

27. INA is and was at all times mentioned herein engaged in the business of writing liability insurance policies.

28. INA issued an insurance policy to B-E-H, numbered LB-34781, for the period December 31, 1961 through December 31, 1964.

29. INA issued an insurance policy to B-E-H, numbered LAB-18201, for the period January 1, 1965 through January 1, 1968.

30. INA issued an insurance policy to B-E-H, numbered LAB-18725 for the period January 1, 1968 through August 23, 1968.

31. Such policies, LB-34781, LAB-18201 and LAB-18725, are substantially similar and provide, in part, that INA has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos.

32. Aetna was and is at all times mentioned herein in the business of writing liability insurance policies.

33. Aetna issued an insurance policy to plaintiff numbered 72AL141319 SR(Y) for the period August 23, 1968 to August 23, 1971. Such policy provides, in part, that Aetna has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos.

34. Hartford was and is at all times mentioned herein in the business of writing liability insurance policies.

35. Hartford issued the following insurance policies to plaintiff: 10-C-B30200E for the period August 23, 1971 to August 23, 1972; 10-C-B30201E for the period August 23, 1972 to August 23, 1973; and 10-C-B30204E for the period August 23, 1973 to October 1, 1974. Such policies provide, in part, that Hartford has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos.

36. Liberty was and is at times mentioned herein in the business of writing liability insurance policies.

37. Liberty issued an insurance policy to plaintiff, numbered LGI-121-0222-00-027, for the policy period August 23, 1967 through August 23, 1968.

38. Liberty issued insurance policies to plaintiff numbered LGI-621-004-095-034/5/6/7/8/9 for the period October 1, 1974 through September 30, 1980. All Liberty policies issued to Keene provide, in part, that Liberty has contracted and agreed to indemnify Keene or its predecessors for such damages as are determined because of bodily injury resulting from an exposure during the policy period to products containing asbestos. Pursuant to such policies on and subsequent to October 1, 1976, Liberty has agreed to defend and indemnify plaintiff but on a basis where most of the cost is borne by plaintiff.

39. Pursuant to the terms of their respective policies, defendants INA, Aetna, Hartford, Liberty and PMA, each contracted and agreed that they had the duty to defend any suit brought against Keene or its predecessors for personal or bodily injury allegedly caused in whole or in part by an accident or occurrence during the policy period of their respective policies, even if the allegations in such suit are groundless, false or fraudulent.

40. Bodily injury includes, in such policies, injury, sickness and disease. In cases of alleged asbestos-related

injury, sickness or disease, bodily injury within the meaning of the policies issued by defendants to plaintiff and its predecessors occurs when asbestos fibers are inhaled or ingested and lodge in the lungs or other organs and subsequent to such inhalation or ingestion.

41. Occurrence includes, in such policies, an exposure to conditions which result in bodily injury and progressive bodily injury.

42. The insurance policies which are the subject of this complaint are occurrence or accident policies and are not discovery or claims made policies.

43. Alleged bodily injury resulting from alleged exposure to asbestos is claimed to occur after inhalation of asbestos fibers and before manifestation or medical diagnosis.

44. Plaintiff has requested that defendants honor their duty to indemnify plaintiff and also to defend any and all lawsuits against plaintiff alleging asbestos-caused injury, sickness, disease or death allegedly from exposure to products containing asbestos, manufactured or sold by Ehret Magnesia, B-E-H or KBPC.

45. On or about October 14, 1977 and November 15, 1977, INA erroneously denied that it had a duty to defend any action in which B-E-H was not specifically named as a defendant or to indemnify plaintiff as to any such action. Thus, for example, INA has erroneously contended that if plaintiff is named as "Keene" rather than as "B-E-H" that INA has no duty to indemnify and no duty to defend.

46. Defendant INA also has erroneously asserted that it has no duty to defend any suit brought against an insured such as plaintiff in which it is alleged or established that exposure to asbestos fibers emanating from an insured's products or operations during the policy

period caused injury unless it is also alleged or established that an esbestos-related injury was first known or should have been known by the claimant, or was medically diagnosed during the policy period of the policy. Thus, INA contends that its duty to defend depends upon the date of manifestation rather than the dates of exposure or progressive injury.

47. Defendant INA has erroneously asserted that it has no duty to indemnify an insured such as plaintiff for any liability imposed upon the insured for injuries due to exposure, during the policy period, to asbestos fibers emanating from an insured's products or operations unless an asbestos-related injury was first known to or should have been known by the claimant, or was medically diagnosed during the policy period. Thus, INA contends that its duty to indemnify depends upon the date of manifestation rather than the dates of exposure.

48. Defendant INA erroneously has denied and deprived plaintiff of insurance coverage for liability for an asbestos-related injury and defense of actions brought alleging such liability unless the injury was first manifested, that is, first known by the claimant, should have been known by the claimant, or happened to be medically diagnosed during the policy period of one of its policies.

49. Contrary to the position which it has taken in its dealings with plaintiff, INA itself has sought contribution and litigation expense arrangements with other insurers using periods of exposure and not manifestation or medical diagnosis as the determining factor.

50. The erroneous construction urged by defendant INA, if applied to the policies issued by the other defendants to Keene and its predecessors, would similarly deprive plaintiff of (a) insurance coverage for any injury caused by exposure to asbestos fibers emanating from alleged Ehret Magnesia, B-E-H or KBPC asbestos prod-

ucts during the policy period of such policies, and (b) defense of actions brought alleging such injuries, unless the injury was first known by or should have been known by the claimant, or was medically diagnosed during one of those periods.

51. Defendant Aetna has construed and will construe its aforesaid policy in the same erroneous manner that INA has construed its policies both with respect to coverage for indemnity and the duty to defend.

52. Defendant Hartford has construed and will construe its aforesaid policies in accordance with an exposure principle but seeks to apportion its defense and indemnity obligations.

53. Defendant Liberty has construed and will construe its aforesaid policies in the same erroneous manner that INA has construed its policies with respect to coverage for indemnity and the duty to defend.

54. Defendant PMA has construed and will construe its aforesaid policies in the same erroneous manner that INA has construed its policies both with respect to coverage for indemnity and the duty to defend.

55. Defendants each have a duty and obligation to indemnify plaintiff if the plaintiff is found liable to an injured third party who was exposed to asbestos fibers emanating from the insured's asbestos products or operations or that of its predecessors or incurred progressive injury during the policy periods.

56. Defendants each owe plaintiff a duty to defend plaintiff with respect to any suit brought against plaintiff or its predecessors in which it is alleged or established the exposure to asbestos fibers emanating from alleged Ehret Magnesia, B-E-H or KBPC asbestos products

or progressive injury occurred during the policy period of any policy it or its predecessor issued to Keene, B-E-H or Ehret Magnesia, and to indemnify plaintiff for any liabilities and expenses plaintiff may incur with respect to any such suit.

57. Defendants are fully liable to defend and indemnify plaintiff at no cost to Keene whatsoever.

58. A controversy exists between plaintiff and each of the defendants with regard to each defendant's duties and obligations under its respective insurance policies to indemnify plaintiff for liabilities and expenses plaintiff has incurred or may incur in connection with numerous past and pending actions against plaintiff and in connection with similar actions to be filed against plaintiff in the future.

59. A controversy exists between plaintiff and each of the defendants with regard to each defendant's duties and obligations under its respective insurance policies to defend plaintiff with respect to numerous suits in which it has been alleged or established that exposure to asbestos fibers emanating from alleged Ehret Magnesia, B-E-H or KBPC asbestos products or progressive injury occurred during the policy periods of such policies.

60. Each defendant has an unlimited obligation to defend and indemnify plaintiff with respect to any case in which it is alleged or established that claimant was exposed, at any time during the policy period, to Ehret Magnesia, B-E-H or KBPC products allegedly containing asbestos or incurred injury as a result thereof.

WHEREFORE, plaintiff requests a judgment declaring its rights under the aforesaid insurance policies, and such other and further relief as is just and proper.

COUNT II

61. Plaintiff repeats and realleges paragraphs 1 through 60 inclusive with the same force and effect as if stated fully herein.

62. Plaintiff has been named as a defendant in many actions filed in various federal and state courts throughout the United States. The claimants in such actions have sought damages for personal injury or wrongful death allegedly resulting from exposure to asbestos fibers, including fibers emanating from alleged Ehret Magnesia, B-E-H or KBPC asbestos products.

63. Each defendant insurer is fully obligated to indemnify plaintiff if the plaintiff is found liable to an injured third party who was exposed to asbestos fibers emanating from the insured's products or operations or that of its predecessors or incurred progressive injury during the policy period of any of the policies it issued to plaintiff or its predecessors.

64. Each of the defendants has breached its contract of insurance by failing to defend and indemnify Keene in asbestos-related cases.

65. As a direct and proximate result of said breaches, Keene has been deprived of the benefit of insurance coverage from at least 1948 to present, and as of this date has incurred substantial actual damages for the defense of and payments of settlements and judgments in asbestos-related cases. As the total amount of damages is continually increasing, Keene will ask leave of court to amend its complaint to specify the amount of its damages when the exact amount thereof has been ascertained.

66. Keene has been forced to incur and will continue to incur attorneys' fees and expenses in order to prosecute this action for declaratory relief and damages.

Keene is entitled to recover these attorneys' fees and expenses.

WHEREFORE, plaintiff requests judgment for (1) compensatory damages according to the proof at trial; (2) consequential damages including, but not limited to, all defense costs, judgments and settlements without regard to policy limits, and reasonable attorneys' fees in the underlying actions, and all reasonable attorneys' fees, expenses and costs incurred in the prosecution of this action; (3) interest according to law; and (4) such other and further relief as the court may deem just and proper.

COUNT III ADDRESSED TO DEFENDANTS INA AND AETNA

67. Plaintiff Keene repeats and realleges paragraphs 1 through 66 inclusive with the same force and effect as if stated fully herein.

68. Implied in each of the defendants' insurance policies is a covenant by each of the said defendants that it will act in good faith and deal fairly with the insured, that it will do nothing to interfere with the rights of Keene to receive the benefits of each policy, and that it will place the interests of Keene before its own interests.

69. In breach of this convenant, defendants INA and Aetna interpreted their respective insurance policies for the purpose of consciously withholding from Keene the rights and benefits to which Keene is entitled under its policies.

70. INA and Aetna have adopted the manifestation position with full knowledge that said interpretations are incorrect, are contrary to policy language, are inconsistent with the reasonable expectations of defendants' in-

sureds including Keene, are contrary to established claims practices, medical evidence and legal precedent, and constitute bad faith.

71. Defendants INA and Aetna, and each of them, have adopted said interpretations to further their own financial interests at the expense of their insureds including Keene. The actions of these defendants were willful and malicious and were done with the deliberate intent of injuring Keene.

72. As a direct and proximate result of each defendants' bad faith, Keene has been denied a defense and indemnification in the asbestos cases and has been required to prosecute the within action to secure the rights and benefits owing to Keene under its policies of insurance. Keene is entitled to recover said damages from defendants and to recover punitive damages from defendants INA and Aetna in an amount sufficient to punish and make an example of defendants in order to deter such conduct in the future.

73. As a direct and proximate result of each of said defendants' conduct, Keene has been damaged and will continue to suffer damages in the manner alleged hereinabove. Keene will ask leave of Court to amend its complaint to specify the amount of its damages when the exact amount thereof has been ascertained.

WHEREFORE, plaintiff requests judgment for (1) compensatory damages according to proof at the time of trial; (2) consequential damages including, but not limited to, all defense costs, judgments and settlements without regard to policy limits and reasonable attorneys' fees in the underlying actions, and all reasonable attorneys' fees, expenses and costs incurred in the prosecution of this action; (3) punitive damages; (4) interest ac-

cording to law; and (5) such other and further relief as the court may deem just and proper.

Respectfully submitted,

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By _____
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Attorney for Plaintiff

Dated: Washington, D.C.
April —, 1980

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 1980 a copy of the foregoing motion by plaintiff Keene Corporation for an order granting leave to file its Second Amended Complaint, proposed Order and accompanying Statement of Points and Authorities in support of its motion was hand-delivered to:

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1011

KEENE CORPORATION,
Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,
Defendants.

DEFENDANT HARTFORD'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Defendant Hartford opposes plaintiff Keene's motion for leave to file a second amended complaint because Keene's motion is both untimely and prejudicial.

According to the original schedule agreed upon by all parties and approved by this Court, this case would have been in trial when Keene filed its motion to amend on April 15, 1980. The original schedule was modified, at Keene's request, based on a representation by Keene's counsel that Keene would file an allegedly "dispositive" motion for summary judgment by March 31, 1980. Both that date and the discovery cut-off date were later extended, again at Keene's request, until April 21, 1980.

Less than one week before the motion for summary judgment was due, Keene filed its motion for leave to file a second amended complaint. This was followed, in fairly short order, first by a motion to "suspend" the briefing schedule and then by a motion for a "temporary stay" of the briefing schedule. Those motions were necessitated, at least in part, by the amendments which Keene

is now seeking to make, and those motions, therefore, show the amount of delay and disruption which would occur if the amendments were allowed. Moreover, there is simply no justification for allowing Keene to make substantive changes in the claims asserted more than 22 months after the action was filed and only four business days prior to the close of discovery. As the courts have frequently held, such "undue delay" and "dilatory" tactics warrant denial of the motion to amend. *Vine* v. *Beneficial Finance Co., Inc.*, 374 F.2d 627, 637 (2nd Cir.), *cert. denied*, 389 U.S. 920 (1967). *See also, e.g., PSG Co.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 417 F.2d 659, 664 (9th Cir. 1969), *cert. denied*, 397 U.S. 918 (1970) (denying motion to amend complaint filed 19 months after filing of complaint).

In addition, an analysis of several specific amendments proposed by Keene reveals that those amendments would be severely prejudicial to the defendants, particularly since discovery is now closed. The amendments proposed include: first, an effort to change the theory on which insurance coverage is sought; second, an effort to convert a declaratory judgment claim into a claim for monetary damages for attorneys fees allegedly incurred by Keene in this and other actions; and, third, an effort to add an entirely new count asserting bad faith claims against Aetna and INA (though not against Hartford).

Concerning the theory of coverage asserted, Keene alleged in its prior complaints that bodily injury occurs in the context of asbestos-related injury and disease at the time of inhalation of asbestos fibres. The proposed second amended complaint asserts, *e.g.*, in paragraph 40, that injury occurs at the time of inhalation "and subsequent to such inhalation," presumably during periods in which no exposure to asbestos products has taken place.

Such an amendment at this late state of this litigation would be severely prejudicial to all defendants. All dis-

covery and pretrial proceedings to this date have been based on Keene's previous contentions as to when asbestos-related injury occurs. Extensive new discovery and repetition of prior discovery would be required if Keene's amendment were allowed concerning the precise meaning of Keene's new theory, the presence or absence of any medical support for that theory and any facts which might show that Keene has waived or is now estopped from asserting a new theory of coverage by its prior inconsistent actions and prior knowledge. In addition, as to this proposed amendment, Keene has not even sought to contend that the amendment could not have been offered at some earlier date.

Keene's motion to amend in this respect, therefore, would interject "complicated legal and factual issues requiring extensive discovery and preparation for trial," *PSG, supra*, 417 F.2d at 664, at a stage when "discovery is nearly complete and the case is in its terminal pretrial stages." *United States* v. *Glaxo Group Limited*, 302 F.Supp. 1, 15 (D.D.C. 1969), *rev'd on other grounds*, 410 U.S. 52 (1973). As the federal courts in this and other jurisdictions have consistently held, Keene's attempt should be rejected since it would cause "extended and unnecessary delay" and "hardship to the defendant parties." *Glaxo, supra*, 302 F.Supp. at 16. *See also, e.g., Jacobson* v. *Rose*, 592 F.2d 515, 519 (9th Cir. 1978), *cert. denied*, 199 S. Ct. 2861 (1979) (rejecting proposed amendment which would have "interjected an entirely new issue" where plaintiff was guilty of undue "delay in seeking an amendment").

Keene has also sought to amend Count II of the complaint to convert what was a declaratory judgment claim into a claim for damages for expenses allegedly incurred by Keene in this action and in other asbestos-related suits. This belated effort to change the nature of the claim asserted should also be rejected as untimely and prejudicial. Amended Count II would set forth an "en-

tirely new and different cause of action," *PSG*, *supra*, 417 F.2d at 664, requiring extensive discovery concerning such questions as the basis for Keene's amendment, the precise respects in which the alleged breaches of contract occurred, the nature and justification for the fees and other expenses charged by plaintiff's counsel, and whether Keene's prior conduct or statements constitute waiver or estoppel. In addition, Keene again has offered no reason for its delay in proposing this amendment. *See Goss* v. *Revlon, Inc.*, 548 F.2d 405, 407 (2nd Cir. 1976), *cert. denied*, 434 U.S. 968 (1977) (holding that amendment would not be permitted where plaintiff offered "no reason" for "extended and undue delay, other than ignorance").

Concerning the new count which Keene proposes to add to the complaint, Keene claims that the information necessary to assert bad faith claims against Aetna and INA has only recently become known through discovery. *See* Keene's Statement of Points and Authorities at 2-3. Hartford takes no position on whether Keene is entitled to pursue such claims against these other defendants at some point. To allow Keene to amend its complaint at this time, however, would subject Hartford to extensive additional discovery and expense, as well as delay still further the resolution of the critical insurance coverage questions underlying this litigation. Hartford has already been subjected to extensive discovery concerning other parties for the past two years. As the courts have ruled, parties such as Hartford "are entitled to a prompt resolution of the long standing claims against them" and should not be required to suffer the prejudice and delay which would result from the assertion of additional claims against other parties in an action such as the instant case. *Mertens* v. *Hammell*, 587 F.2d 862, 866 n.7 (7th Cir. 1978). *See also, e.g., Glaxo, supra*, 302 F.Supp. at 15, 16.

Thus, Keene's request to add claims of bad faith against INA and Aetna should be denied. Alternatively,

if this Court should decide to allow bad faith claims to be asserted in this action, those claims should be bifurcated, pursuant to Rule 42(b), from the pending claims so that a final resolution of the pending claims will not be delayed and so that the defendants not affected by the bad faith claims will not become enmeshed in discovery and trial proceedings concerning those claims.

CONCLUSION

For the foregoing reasons, defendant Hartford respectfully requests that plaintiff's motion for leave to file a second amended complaint should be denied.

Respectfully submitted,

HOGAN & HARTSON

/s/ David J. Hensler
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 1980, a copy of the foregoing Defendant Hartford's Opposition to Plaintiff's Motion for Leave to File Second Amended Complaint was hand-delivered to Harold D. Murry, Jr., Esquire, Clifford & Warnke, 815 Connecticut Avenue, N. W., Washington, D. C. 20006, and mailed, postage-prepaid, to the following:

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APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1011

KEENE CORPORATION,

Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Defendants.

ORDER

Upon consideration of plaintiff's motion for an order granting leave to file second amended complaint, defendants' oppositions, the oral arguments of counsel, and the entire record herein, and it appearing that plaintiff's motion should be granted in part and denied in part, it is by the Court this 30th day of April 1980,

ORDERED that plaintiff may amend its complaint as set forth in its motion at Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 with regard to paragraph 27 only (new paragraph 39), 15, 16, 17 and 23; it is further

ORDERED that plaintiff's motion is in all other respects denied; it is further

ORDERED that plaintiff shall file its amended complaint within 5 days of the entry of this order; and it is further

ORDERED that defendants shall file amended answers within 5 days thereafter.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX H

COMPANIES AFFILIATED WITH PETITIONER HARTFORD ACCIDENT & INDEMNITY COMPANY

The Parent corporation of Hartford Accident & Indemnity Company is Hartford Fire Insurance Co., a subsidiary of International Telephone and Telegraph Corp. The following corporations are also subsidiaries of Hartford Fire Insurance Co.: Pacific Insurance Co., Ltd., Sentinel Insurance Co., Ltd.; Hartford Casualty Co.; New York Underwriters Insurance Co.; Twin City Fire Insurance Co.; London Canada Insurance Co.; Hartford Life and Accident Insurance Co.; First State Insurance Co.; Great Eastern Insurance Co., Ltd.; and London and Edinburg General Insurance Co. of Canada.

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
FEB 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY MEMORANDUM

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February 23, 1982

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Summary of Argument	1
Argument	2
I. The Petition For Writ Of Certiorari Presents Three Important Federal Or Constitutional Issues Which Are Different From The Issues On Which This Court Denied Certiorari In The *Forty-Eight* and *Porter* cases	2
II. The Petition For Writ Of Certiorari Does Not Seek To Federalize State Insurance Questions	6
III. Respondent's Contention That The Factual Record Supports The Decision Of The Court Below Is Not Correct And In Any Event Need Not Be Considered By This Court	8
Conclusion	10

TABLE OF AUTHORITIES

Cases Page

Crocket v. Lee, 20 U.S. (7 Wheat.) 522 (1822) 3
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) ..*passim*
Free v. Bland, 369 U.S. 663 (1962) 3
Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (1981), *cert. denied*, 50 U.S.L.W. 3466 (U.S. December 7, 1981) (Nos. 81-198 and 81-199) .....*passim*
Lee v. Flintkote Co., 193 U.S. App. D.C. 121, 593 F.2d 1275 (1979) 4
Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (U.S. December 7, 1981) (No. 81-200) .....*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1197

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY MEMORANDUM

SUMMARY OF ARGUMENT

The decision below—as amended *sua sponte*—involves more than state law questions of insurance policy interpretation. It presents no less than three significant federal questions.

The first federal question is whether this Court should exercise its supervisory power where as here the court below, by improper appellate factual findings, created an irreconcilable conflict with two other courts of appeals construing the same policy language in accordance with the same general principles of law. The second federal question is whether the court below violated constitutional

due process of law by making an independent factual finding on an issue which had not been alleged and as to which the district court had denied leave to amend the complaint. The third federal question is whether the *Erie* doctrine applies to the District of Columbia and whether it was violated by reversal of the well established state law rule concerning burden of proof.

These three issues on which petitioner Hartford seeks a writ of certiorari are not the same issues on which this Court denied certiorari in the *Forty-Eight* and *Porter* cases. Nor would review of these issues involve federalization of state insurance coverage questions.

I. The Petition For Writ Of Certiorari Presents Three Important Federal Or Constitutional Issues Which Are Different From The Issues On Which This Court Denied Certiorari In The Forty-Eight and Porter Cases.

Respondent Keene Corporation ("Keene") erroneously states that the instant case "involve[s] solely state law questions and not federal questions." [1] Such is simply not the case.

The first question presented for review by Hartford [2] is not, strictly speaking, an issue of state law: invoking this Court's supervisory power to correct the error of the court below in disregarding the holdings of the two other circuit courts of appeals [3] which construed the same policy

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[1] Brief of Respondent Keene Corporation in Opposition to Petition (hereinafter "Keene Opposition") at 6.

[2] Petition for a Writ of Certiorari by Hartford Accident & Indemnity Company (hereinafter "Hartford Petition").

[3] Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (1981), *cert. denied*, 50 U.S.L.W. 3466 (U.S. Dec. 7, 1981) (Nos. 81-198 and 81-199); Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (U.S. Dec. 7, 1981) (No. 81-200).

language under the same general principles of law, and in reaching diametrically opposite conclusions based on improper appellate fact-finding, without reference to state law. Such conduct violated sound principles of *stare decisis* and judicial administration, and cries out for correction by this Court in the exercise of its supervisory power. Respondent's characterization of the holding below as "solely state law questions" is fatally undercut by the court's opinion which did not even decide which state's law was being applied but stated that its conclusions would be the same regardless.[4]

The second question presented for review by Hartford cannot even arguably be characterized as an issue of state law. That question is whether the court below violated the well established limits of appellate review and denied due process of law by reversing the district court based on independent factual findings on an issue ("exposure in residence") which was not alleged in the district court and which the district court had denied leave to amend the complaint to include. Indeed, in its amended opinion issued while the petitions for certiorari were pending, the court below explicitly conceded, "Keene did not raise the exposure-in-residence aspect of its argument below."[5] This Court has long recognized that such conduct is serious error as a matter of federal law. *E.g., Crocket v. Lee*, 20 U.S. (7 Wheat.) 522, 525 (1822) ("No rule is better settled than that the decree must conform to the allegations, as well as to the proof in the case"); *Free v. Bland*,

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[4] App. A at 10a-11a, n.10.

[5] *See* Appendix at 2a, attached to Hartford Supplemental Brief in Support of Petition for a Writ of Certiorari (hereinafter "Hartford Supplemental Brief"). Keene's reference to isolated bits of testimony which do not even use the term "exposure in residence" (Keene Opposition at 10, n.19) ignores the incontrovertible fact that exposure in residence was not alleged and Keene's motion to amend its complaint to add the allegation was denied. App. C, at 67a, ¶ 25; App. D, at 78a, ¶ 28; App. E, at 101a, ¶ 40; App. G, at 116a, ¶ 3.

369 U.S. 663, 671 (1962) (where fraud had not even been alleged, no issue of fraud could be decided on a motion for summary judgment). The court below similarly erred in making its original appellate finding of Keene's "reasonable expectations," modifying this clearly erroneous finding to "the expectation that Keene could have reasonably formed, as an objective matter," but ignoring the actual expectations of Keene in the factual record.[6] This double violation of the appellate function denied petitioner due process of law and justifies summary reversal and remand.

The third question presented for review is a constitutional one, whether the *Erie* doctrine applies to the District of Columbia and whether it was violated by reversal of the well established state law rule concerning burden of proof. It is a constitutional issue of first impression for this court whether *Erie* applies, directly or by analogy, to diversity cases in the federal courts of the District of Columbia.[7] A further constitutional issue is whether the court below failed to follow *Erie*, directly or by analogy, when it explicitly recognized that state law in all jurisdictions uniformly requires that an insured bear the burden of proof of insurance coverage,[8] and yet reversed the burden of proof on the grounds—subsequently asserted in the *sua sponte* amended opinion—"that this case is so different . . . that those cases provide no authority for this case."[9]

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[6] App. A, at 13a n.12; Supplemental Appendix 1a at n.12.

[7] The Court of Appeals for the District of Columbia Circuit has held that Erie does not apply to diversity actions in the District of Columbia, but that the principles of *Erie* are to be followed analogously. *E.g.*, Lee v. Flintkote Co., 193 U.S. App. D.C. 121, 124 & n.14, 593 F.2d 1278 & n.14 (1979).

[8] App. A at 34 & n.42.

[9] Supplemental Appendix 2a, attached to Hartford Supplemental Brief.

It is Respondent Keene which attempts to transform a constitutional issue under *Erie* into a state law issue by advancing the contrived contention that the court below was somehow correct as a matter of state law in reversing the burden of proof,[10] although the court below declared precisely the opposite in both its opinion and amended opinion, in finding that state law was to the contrary.[11] Moreover, in an attempt to bolster this tenuous contention, Keene utterly fabricates a purported quotation wrongfully misattributed to Hartford's *amicus* brief in *Forty-Eight*.[12] In any event, this Court need not decide this purported issue of state law presented by respondent Keene, which has already been rejected by the court below. Rather, this Court should decide the constitutional issues under the *Erie* doctrine and remand to the court below for proper application of that constitutional doctrine.

The three federal questions discussed above were *not* present in the *Forty-Eight* and *Porter* cases.[13] The *Forty-Eight* and *Porter* courts did *not* disregard the holdings of other circuit courts of appeals; the *Forty-Eight* and *Porter* courts did *not* make independent factual findings concerning issues not alleged in the complaint and as to which

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[10] Keene Opposition at 12-13.

[11] App. A, at 34a, n.42; Supplement Appendix at 2a.

[12] Keene Opposition at 13, ¶ 1. No such quotation appears at page 5 or any other page of Hartford's *amicus* brief in *Forty-Eight*.

[13] Thus, Keene's out of context quotations from Hartford's brief opposing certiorari in *Forty-Eight* and *Porter* are simply irrelevant here. Keene Opposition at 6. The three issues on which review is sought in the instant case are not "considered determinations of state law" because first, they are not determinations of state law and, second, in any event, nothing in the opinions of the court below can be characterized as a "considered determination of state law" where the court below did not even identify which state's law was being applied, App. A, at 10a-11a, n.10, in marked contrast to the *Forty-Eight* court which discussed at length the pertinent Illinois and New Jersey cases and the *Porter* court which analyzed in detail the law of Louisiana.

the district court had denied leave to amend; the *Forty-Eight* and *Porter* courts did *not* have the constitutional issue of first impression in this Court as to whether the *Erie* doctrine applies to diversity cases in the District of Columbia.[14] For these reasons, this Court's denial of certiorari in the *Forty-Eight* and *Porter* cases is neither dispositive nor even helpful in the consideration of the new issues—federal and constitutional—raised in Hartford's petition.

II. The Petition For Writ Of Certiorari Does Not Seek To Federalize State Insurance Questions.

Contrary to Keene's assertion, the instant petition for a writ of certiorari does not seek to federalize state insurance law.[15] It is not a federalization of state law for this Court to remand to the court below with instructions to honor the doctrine of *stare decisis* and to follow the decisions of other circuit courts of appeals. The court below found no difference in state laws which might justify its divergent opinion.[16] Moreover, the court below made improper factual findings on issues not even alleged which caused its failure to follow the holdings of other circuit courts of appeals. It is not a federalization of state insurance law for this Court to uphold the traditional limits on appellate review by vacating an appellate decision which has no basis in the allegations of the complaint. And it is most certainly not a federalization of

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[14] There was an *Erie* issue in *Forty-Eight* concerning the burden of proof. Petitioner Hartford filed an *amicus* brief in *Forty-Eight* which sought review solely on that issue. However, the court in *Forty-Eight* had at least cited the correct state law concerning burden of proof and therefore the issue was whether state law had been properly applied, an issue on which this Court generally denies review. Where as here no state law was cited, the holding of the court below lacks the foundation in state law which precluded review in *Forty-Eight*.

[15] Keene Opposition at 7.

[16] App. A, at 10a-11a, n.10.

state insurance law for the Court to enforce the *Erie* doctrine and require the court below to apply the traditional state law on burden of proof.

Respondent Keene analogizes that application of the laws of different states often produces inconsistent results involving a variety of insurance coverage issues.[17] This analogy is beside the point. First, as the court below recognized, there is no difference in the underlying state law [18] and therefore state law provides no justification for the wholly unprecedented analysis and result of the court below. Second, there are fundamental differences in scope and effect between Keene's examples of the "inconsistent results" of differing state laws involving punitive damages and the like, and the much greater scope and chaotic effect of totally variant analysis of the apportionment of liability among many insurers, the excess carriers, and the asbestos manufacturers for periods of up to forty years. This conflicting analysis exposes many insurers to contradictory instructions from circuit courts of appeals and makes utter chaos of the calculation of co-defendant's liability. This is not a question of insurers seeking to be excused from performance of contractual obligations under state law, as Keene suggests.[19] Rather, it is a question of the impossibility of determining those contractual obligations where, as here, the court below has created a mode of analysis which is irreconcilable with the decisions of the other circuit courts of appeals.

Respondent Keene conclusorily asserts that there is no "real conflict" among the circuits created by the decision below.[20] The unifying principle which Keene derives from vastly disparate holdings is that the policyholder always wins.[21] Whatever the merits of Keene's realpolitick

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[17] Keene Opposition at 8.

[18] App. A, at 10a-11a, n.10.

[19] Keene Oposition at 9.

[20] Keene Opposition at 9.

[21] Keene Opposition at 10.

theory— and there are none [22]—it evades the fundamental question: how are costs of indemnification and defense to be apportioned in a given case where some insurers are enjoined under *Forty-Eight* and *Porter* to indemnify some asbestos manufacturers on a *pro rata* basis derived from the period of exposure during the policy period, other insurers are enjoined under *Keene* to indemnify other asbestos manufacturers for damage before, during, and after the policy period, and insurers of asbestos manufacturers not yet parties in a circuit court decision must apply the choice of law rule of the forum which may result in yet a third formula for apportionment of liability. The assertion of Keene that there is "no conflict" rings exceedingly hollow where neither Keene nor anyone else can even explain how these vastly disparate holdings can be reconciled in a workable administrative manner.

III. Respondent's Contention That the Factual Record Supports the Decision of the Court Below Is Not Correct and In Any Event Need Not Be Considered by This Court.

Respondent Keene selects out-of-context fragments of testimony in a nine volume Joint Appendix in an attempt to persuade this Court that there was some factual basis for the decision of the court below. These factual materials were neither analyzed nor even considered by the trial court which found them extraneous and immaterial to its decision. Nor did the court below rely on any of these fragments of evidence in its opinion and for very good reason. Each of these highly-edited quotations is

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[22] It is the function of insurance to provide a rational economic mechanism to protect individuals against the risk of injury or loss in exchange for a certain premium. Whenever this mechanism breaks down, it is the public which loses, regardless of short term monetary gain to a single policyholder. There can be no question that the opinion of the court below, if left unreviewed by this Court, would impede the effective functioning of the insurance process by subjecting insurers to conflicting injunctions from circuit courts of appeals.

wrenched out of context from a Joint Appendix which contain numerous materials to the contrary.[23] Thus, no contention can be made that the factual record, as cited by Keene, supports the opinion of the court below where, as here, those facts had not been analyzed by the district court or the court of appeals.

Respondent Keene now asks this Court to review *ab initio* factual materials which were never analyzed by the trial court or the court below. This is not a proper appellate function, much less an appropriate function for this Court. To the extent that these factual materials have any relevance to the pending petition for certiorari—and petitioner Hartford contends they have none because they were not relied upon by the court below—these factual materials present a mass of disputed material facts which would raise serious questions about the propriety of summary judgment entered by the Court of Appeals in favor of Keene. Thus, even if deemed relevant, the disputed factual materials in the Joint Appendix would support the grant of a writ of certiorari and provide no basis for the Court to deny certiorari.

Keene and certain *amici* attempt to bolster the weakness of the opinion of the court below by reference to purported evidence totally outside the record of this case.[24] This is a wholly improper procedure which prejudices petitioners which have no legitimate opportunity to present non-record evidence to the contrary. Such non-record evidence deserves no consideration whatsoever by this Court.

Keene's statement that the factual record supports the court of appeals' holding on "exposure in residence" is

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[23] For example, Keene's treasurer admitted that to the extent that "the exposure period was outside the year of coverage by a carrier, the carrier would not have the liability" J.A. 3209.

[24] Keene Opposition at 22, Brief of *Amici Curiae* Armstrong World Industries, Inc., et al., at 16-18.

particularly misleading.[25] As already discussed above, "exposure in residence" was not alleged in the district court; leave to amend the complaint to add the concept of "exposure in residence" was denied; the court of appeals in its amended opinion conceded "Keene did not raise the exposure in residence aspect of its argument below."[26] However, the court below nevertheless awarded indemnity for "exposure in residence," thereby creating the conflict with the other circuit courts of appeals.

CONCLUSION

For the foregoing reasons, Hartford's petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 23, 1982

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[25] Keene Opposition at 20.

[26] See note 5, *supra*.